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THE MAKERS OF THE UNWRITTEN CONSTITUTION

BY THE SAME AUTHOR

THE GOVERNMENT OF THE UNITED STATES

THE GOVERNMENT OF AMERICAN CITIES

PERSONALITY IN POLITICS

THE INVISIBLE GOVERNMENT

AMERICAN INFLUENCES ON CANADIAN GOVERNMENT

ETC.

The Makers of the Unwritten Constitution

The Fred Morgan Kirby Lectures, delivered at Lafayette College, 1929

BY
WILLIAM BENNETT MUNRO

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"Let us now praise famous men and the Fathers who have begotten us. Leaders of the people by their counsels, wise and eloquent in their instructions, all these were honored in their generations and were the glory of their times. Their bodies are buried in peace, but their name liveth forevermore."

—*Ecclesiasticus* (Apocrypha).

FOREWORD

THESE lectures were given to popular audiences and are printed as delivered. They make no claim to originality, save insofar as they may be original in their unwitting disclosure of what one lecturer assumes that a public lecture may attempt. Some of the matters with which these chapters deal have been set in a new synthesis, for the data of history can be employed in endless combinations; as for the rest, their enduring significance entitles them to a periodic restatement even if they have lost the flavor of novelty. History does not exist for the erudite alone, nor should all of it be written for their delectation. There is still a body of readers to whom the absence of specific gravity in any book does not place a bar sinister upon it.

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THE MAKERS OF THE UNWRITTEN CONSTITUTION

INTRODUCTION

THE written Constitution of the United States is a document that occupies five pages of print in the World Almanac and can be read in half an hour. But alongside it, and based upon it, there has developed during the past hundred and forty years an unwritten constitution of vastly greater dimensions. It fills the statutes-at-large, the law reports, the printed laws of the individual commonwealths, and constitutional treatises to the extent of a million pages or more. This unwritten constitution is made up of federal and state enactments, judicial decisions, usages, doctrines, precedents, official opinions, and points of view which have profoundly altered the implications of the original instrument. It has made the government of the United States a different affair from that which the framers of the written Constitution intended it to be.

So great has this divergence become at the present day that no one can now obtain even a silhouette of the American political system if he confines his study to the nation's fundamental law as it left the hands of its architects in 1787. Its words and phrases

have been "twisted and tortured" during their journey down these fourteen decades, as Lord Bryce once said, until they now imply things widely remote from what they were originally thought to mean. Governmental powers of vast import have been nurtured from these few pages until we can now speak of the written Constitution as merely the taproot from which the tree of American nationalism has grown. Its branches increase their spread year after year. In a word the national government has become far more powerful in relation to the states than it was at the beginning—more democratic, more efficient, more far-reaching in its influence both at home and abroad.

The makers of the American Constitution neither began nor finished their work in the summer of 1787. Their ancestors began it at Runnymede and continued it at Westminster. Their descendants have kept bravely at the work ever since the Great Convention adjourned. It is often said that the last framer of the Constitution passed off the scene with Madison's death in 1836; but Marshall and Jackson were giving new significance to the supreme law of the land when Madison died. Nor were they the last of the line. In the wider sense of the term the makers of the American Constitution form a great and still growing company. The list will not be closed until the end of time.

What has been said in the foregoing paragraphs is commonplace, or ought to be. Every textbook of American government adverts to the great discrepancy between what the government of the United States was intended to be and what it has become. This, moreover, in spite of checks and balances, limitations and prohibitions, and all the other artifices for preserving equilibrium that eighteenth-century minds could suggest. Such a phenomenon all the more deserves comment because it has not come to pass by reason of the nineteen amendments. Among these formal additions to the original document only one enlarges the powers of Congress. All the rest impose restraints or change methods. The growth of the national government in strength and prestige has not been achieved by broadening the original foundation upon which it rests. Were there no other channels of federal expansion than that which the process of formal amendment has provided, the national government would now be relatively weaker than it was when it started. It has gained virtually the whole of its political and economic hegemony of to-day from statutes, from judicial decisions, and from usages. Together these make up the unwritten constitution, a structure which is the work of many hands, a rambling edifice to which successive generations of statesmen and jurists have each added wings and gables and pillars

until only a semblance of the original architecture remains.

In this development of an unwritten constitution the United States has not been unique among countries which possess free government. All political sytems are continually in process of change; like living organisms they must adapt themselves to an altered environment or die. You cannot encase a living organism in a marble urn and keep it alive. No more can one century be held in bondage to another. The written word, as a basis of popular government, must have the power to expand and contract. This adaptation will be by frank and formal change if the methods of constitutional amendment are easy (as they are in England and Italy); but it will follow other channels when the routine of amendment is roundabout and difficult as in the United States. The instinct of self-preservation in a government will impel it to find such channels, or to make them if need be.

Strange as it may sound to-day, the statesmen of 1787 intended to make the process of constitutional amendment an easy one. That is why they provided four alternative ways of putting an amendment through. They made it possible to initiate amendments in Congress, or without action by Congress. They provided for ratification by the state legislatures or without action by these legislatures

if the occasion required. Hamilton devoted almost an entire Federalist letter to proving the proposition that the amending process could not be made any easier without serious danger of constitutional instability.

Of course it was not anticipated that only one of the alternative methods would ever be used. There was a feeling that the ratification of amendments by conventions in the states would often prove easier than ratification by state legislatures. The situation in 1787 warranted that impression. If the acceptance of the original Constitution had been left to the state legislatures, rather than to conventions called for the purpose, it would almost certainly have been rejected by some of them. Nevertheless, after the Constitution had been ratified by these state conventions, the first series of proposed amendments were initiated by Congress and sent to the state legislatures as the quickest way of getting them into effect. This set a precedent which has ever since been followed. But with this important difference: that it required action on the part of only eleven state legislatures to add these first ten amendments, whereas it now requires affirmative action on the part of thirty-six.

The framers of the original Constitution anticipated, moreover, that from time to time a national convention would be called for the purpose of under-

taking a general revision. If Thomas Jefferson could have had his way he would have made such a revision mandatory at least once a generation. Nothing, in fact, was farther from the expectations of Jefferson, Madison, Franklin and the rest than that this roll of parchment would remain unrevised to help govern their children's grandchildren, or that more amendments would be added during the first ten years of its operation than in the succeeding hundred and thirty. We are sometimes cautioned nowadays against a too-receptive attitude toward constitutional amendments; but it would be difficult to find, at any subsequent stage in American history, a group of men more benevolently inclined toward amendments than were the Fathers themselves.

In any case formal amendment has been only one of the agencies of constitutional flexibility, and by no means the most important one. More has been accomplished by statutory elaboration. The statesmen of 1787 did not desire or deem themselves competent to perform a task of encyclopedic proportions. In eighty-one days they put together and agreed upon only eighty-nine sentences; their four hundred hours of debate and deliberation eventuated in a document of only four thousand words. It was not that they were lacking in vocabulary, but simply that they felt insistent upon leaving the details of government as a hostage to the good sense

of those whom the people would elect as their representatives under the new order. So they bequeathed an abundant legacy of problems to the state legislatures and the new Congress. To take a conspicuous example, they did not stipulate how the presidential electors should be chosen but merely dictated that "each state shall appoint, in such manner as the legislature shall direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress."

Again, they provided that members of the House of Representatives should be elected by the voters —but by what voters? The decision of that question they also devolved upon the state legislatures. To Congress they committed an even more formidable mass of routine to be worked out. The whole structure of the federal judiciary they left to be created by law. On the matter of administrative departments they said next to nothing. How many departments? Their functions? Their relation to Congress? On these and a score of other important matters of governmental practice the statutes have had to supply the omissions.

Some of the statutes which Congress has enacted during the past hundred years are, therefore, to all intents a part of the Constitution—for example, the Act of 1887 which supplements the Twelfth Amendment by fixing in detail the method of count-

ing electoral votes and determining the way in which electoral controversies shall be settled. Another illustration is the Statute of 1886 which fixes the presidential succession in case both the President and the Vice President are unavailable. In the French Republic these enactments would be called "organic laws," that is, laws which are theoretically open to amendment or repeal by exactly the same process as ordinary laws, but which supply certain important cogs in the mechanism of government and hence are virtually permanent and no more likely to be changed than is the Constitution itself.

Alexander Hamilton was the first to demonstrate how the words of the original Constitution could be given an expansive quality by legislation. His great fiscal statutes were the first of a series that has kept lengthening year by year. Congress has pressed its economic powers to the limit and at times has overstepped the bounds, as in the child labor laws. If the opponents of the Constitution could have foreseen the way in which Hamilton would wring economic domination out of its words by the process of statutory elaboration they would have redoubled their opposition. Lawyers use the terms statutory and constitutional in antithesis; but if by a constitution we mean "all the fundamental rules which directly or indirectly affect the distribution and exercise of sovereign power," then there is no prac-

tical difference between some provisions of the American Constitution and some of our organic statutes.

The statutory provision for a Secretary of State is not less firmly anchored than is the constitutional provision for a Speaker of the House. The secret ballot, which rests on legislative enactment, would be harder to displace than freedom from unreasonable searches, even though the latter rests on a constitutional guarantee. The National Defence Act circumvents an implication of the Constitution and makes it possible for the President to call forth the militia of the states for service outside the United States (which clearly was not intended), by the artifice of "federalizing" these militia organizations overnight. Hence it is sometimes said, and with reason, that for governmental principles one may look in the Constitution, but that for governmental practice one must look in the statutes.

At any rate most of the things that the student of actual government desires to know are in the statutes, not in the four thousand words of the Constitution. Even the process of lawmaking itself has had to be built up without guidance from those who laid the foundations. The Constitution declares, for example, that the House of Representatives shall choose its own Speaker, but it does not say what his powers shall be. These are fixed by the rules

of the House. It requires the assent of both House and Senate for the enactment of laws, but says nothing about how a disagreement between the two chambers shall be settled. The whole system of conference committees is based upon rules made by the two legislative bodies themselves. The Constitution does not even require that bills be given three readings, or referred to committees, or placed on the calendar. It says not a word about budgets, deficiency appropriations, filibustering, time-limits, lobbying, leave to print, riders, suspension of rules and the countless other incidentals of the lawmaking industry which attract so much interest nowadays.

Judicial and administrative decisions form the second cornerstone of the unwritten constitution. It is one of the fictions of juristic philosophy that the courts do not alter constitutions. They only interpret them. But Justice Oliver Wendell Holmes blurted the truth when he declared that courts "do and must legislate," despite their professions to the contrary. Likewise administrators do and must make laws—notwithstanding Montesquieu, Madison, John Adams and their devotion to the theory of separation of powers. It must inevitably be so, for to give a rule a new interpretation is to give it a new meaning, and to give it a new meaning is to alter it.

The course of actual alteration has now pro-

ceeded so far that the student who desires to know the actual powers of Congress will get a very inadequate, and often a misleading idea of their scope and ramifications if he merely runs through the eighteen formal powers granted to Congress by the Constitution itself. Hundreds of judicial decisions have widened these original powers beyond recognition, yet never in a single instance has any American court asserted its power to make actual changes in the phraseology of the constitution or the laws. It is merely that the stretching of a phrase in one decision provides the basis for a further elongation in the next; the lines of alteration are pricked out gently by one adjudication after another until a great divergence appears between the finish and the start.

Let one or two illustrations suffice: The framers of the Constitution gave Congress power "to regulate commerce with foreign countries and among the several states," intending thereby to enable the nation to set up a tariff of its own while preventing the states from setting up tariffs against one another. Then, in 1824, the Supreme Court ruled that "commerce" included not only the merchandise but the carriers of commerce; thereby inaugurating a long series of decisions in which it has held that commerce also includes the transportation of passengers by land and water, the sending of messages by wire,

and the transmission of electric power; but that the term is not flexible enough to include life insurance, or the making of commercial contracts, or the protection of migratory birds. Hence it is that a word which was put into the Constitution by men who knew only sailing vessels and stage coaches has been broadened to include steamships, railroads, trolleys and motor busses, telegraph and telephone lines, radio broadcasting and traffic by airplane.

Or, to give another example of this verbal expansiveness: The Constitution provides that Congress shall have power "to support armies." To the eighteenth-century mind these words meant feeding, clothing and paying armed men in the field. But during America's participation in the World War they proved flexible enough to authorize the fixing of meatless and wheatless days for the whole civilian population, the stoppage of building operations, the cessation of industry on certain days of the week, and the taking over of the railroads. A vast amount of federal authority lies embedded in these three words!

The framers of the Constitution realized, of course, that differences of opinion would arise as to what the words and phrases of the Constitution expressed or implied, and they took for granted that the courts would resolve such difficulties just as they had been doing under the state constitutions. But

they could not have foreseen the stupendous amount of interpreting that would be necessitated by the growth of the country, nor could they have envisaged the subtle way in which this interpreting process would redound to the advantage of the federal government. Most of the strength with which Hamilton unavailingly sought to endow Congress in 1787 has been imparted by Marshall and his successors. The stone which the builders rejected has become the chief stone of the corner.

And it is not the courts alone that interpret the words of the Constitution. Administrative officers, from the President down, are almost daily confronted with the necessity of taking certain actions in virtue of what they deem to be their legal or constitutional powers. Such actions, although they may be challenged and subjected to judicial review, are for the most part allowed to pass without protest on the part of anyone and thus form precedents for the future. It is true, of course, that no administrative ruling, however long acquiesced in, is immune from reversal at the hands of the judiciary. Nevertheless when important private rights have been established under some such ruling, the courts are reluctant to disturb it. Executive orders and administrative regulations have been increasing at a rapid rate during the last twenty-five years. To-day they may be counted among the important agencies of

constitutional development. Incidentally it ought to be explained that where there is any serious doubt as to the constitutionality or legality of an administrative regulation, the usual practice is to seek the opinion of the Attorney-General. The opinions of this officer are not given until after careful study has been made by his subordinates.

"Time and habit," said Washington, "are necessary to fix the true character of governments." Usage is merely habit long-continued and writ large. Governments, like men, adopt ways of doing things and in time these ways become traditional. In other words they become stereotyped in the national thought. To change a tradition involves re-educating a whole people, which is a long and difficult task. The written Constitution, for example, permits both the President and the Vice President to be chosen from the same state. But that has never happened and probably never will. The usage is that they shall be chosen not only from different states but from different sections of the country, and any departure from this practice would be resented. So strongly is this usage entrenched that it would be easier to ignore a specific constitutional requirement (e.g. that a senator must be thirty years of age) than to place two Rhode Islanders, let us say, in the nation's chief executive posts at the same time.

Governmental usages are sometimes more con-

straining than the laws, and much has been written about the way in which the original Constitution of the United States has been modified by the influence of "time and habit." [1] In general, however, too much emphasis has usually been placed upon usages which are, after all, of secondary importance. The example of an American constitutional usage most commonly cited is the one that now controls the method of choosing the President. Textbooks rarely fail to explain how the framers of the written Constitution desired the people to have no direct share in the choice of the chief executive and how usage has nevertheless given them a share which is both direct and complete. But such discussions regard the forms too much and the facts too little. It is true, no doubt, that some members of the Philadelphia Convention distrusted the competence of the electorate and were averse to the choice of the President by the people; but it was not out of deference to them that the plan of indirect election was finally adopted. Far more influential than any distrust of the populace was the argument that indirect election would give candidates from the smaller states a chance. Their merits could be much more easily made known to small groups of electors than to the people of the whole nation.

[1] The latest book on this subject is H. W. Horwill's *Usages of the American Constitution* (Oxford, 1925).

Moreover, it should be borne in mind that the men who framed the Constitution had scant expectation that the President would regularly be chosen by the presidential electors. On the contrary they assumed that these electors would in each case be likely to vote for some one from their own states and hence that no one would get a majority of all the electors, save in very exceptional circumstances. Mason of Virginia predicted on the floor of the Convention that not once in twenty elections would any candidate get a majority of all the electoral votes. This meant that under normal conditions the electors would merely nominate, and the House of Representatives would make the final choice from among the five highest nominees.[1] In making this final choice, however, the House was to vote by states, each state having one vote irrespective of its size. That is where the small states scored in the Convention of 1787.

But their victory turned out to be a hollow one. Usage presently determined that nominations should be made by political parties, that the presidential electors should be pledged in advance, and that Mason's prediction should be almost exactly reversed. Since 1788 there have been thirty-five

[1] Hamilton predicted that this "ultimate though contingent power of deciding competitions of the most illustrious citizens of the Union for the first office in it," would greatly enhance the power of the House. *The Federalist*, No. 66.

presidential elections and on only two of these occasions has the House made the decision.[1] The last occasion was over a century ago, before the two-party system had become definitely established.

Many other usages have caused departures from the intent of the Fathers, and some of these usages will quickly come to the mind of anyone who is familiar with the practice of American government. The President's cabinet embodies one of them. Governors' councils were well known in 1787, but no provision was made for a President's council. Apparently it was the intention that the Senate to a limited extent should serve as one, and Washington tried to utilize it in that way, but his experience did not warrant a continuance of the attempt. So the heads of departments began to meet—occasionally at first and then regularly. The term "cabinet" was not applied to them collectively until the early years of the nineteenth century.

The usage which restricts a President to two consecutive terms has received new emphasis in recent years. Lord Bryce was hardly justified in his statement, a few years ago, that this tradition seems to have "lost nearly all its influence." The likelihood that it will ever be upset seems smaller to-day than

[1] The Hayes-Tilden Election of 1876 is not included for the reason that the action of Congress did not ensue in this case because no candidate had a majority but because both claimed to have one.

at any previous time. So with the popular insistence on resident congressmen. In the written Constitution there is no requirement that a member of the House of Representatives shall live in the district from which he is elected. It was not definitely intended that there should be congressional districts. But as a practical matter the requirement is hardly less constraining than if it were a specific constitutional one; and unfortunately so, for it needlessly limits the range of popular choice and accentuates the spirit of localism in national politics. A dozen other examples of the influence of usage might be given; but this is not the place for them.

If the men who set up the political framework of 1787 were to rise from their narrow cells, after their long sleep of more than a century, what departures from their original conception would be the most astonishing to them? Without question they would be profoundly impressed by the far-reaching influence upon the nation's economic life which the federal government has been able to wrest from the first three paragraphs of Article I, Section 8. It would dawn upon them that what they intended to be a political instrument has become the basis for a vast endowment of economic authority and influence.

It is true, of course, that these paragraphs of the Constitution grew out of the economic necessities of

the day. The whole document, indeed, was not so much a declaration of faith as of fears, for it was put together in an atmosphere of restlessness, at a time when business conditions in the thirteen states were about as bad as they could be. Independence had been gained by the war, but not prosperity. The war had burdened both the states and the Confederation with debt; the country had been deluged with paper money; prices were excessively high; trade was not reviving; and there were no agencies of credit able to cope with the situation. In their bewilderment the people of the various states were clamoring for the establishment of tariffs, each against the others, and seeking to better their own economic situation at the expense of the rest. There was a Congress of the Confederation, sitting at Philadelphia whenever it could muster a quorum; but it was without power to tax, without capacity to borrow, and without authority to enact the only measures that would secure economic prosperity.

The Philadelphia Convention of 1787 was called together for the purpose of dealing with this emergency. Its leaders had, as their primary motive, the desire to endow the central government with three powers which it did not possess, namely, the power to tax, the power to borrow (with means of repayment), and the power to regulate commerce. All else was incidental and subsidiary. Had it not

been for the economic crisis it is difficult to believe that the states would have responded to the call for a convention.

Nevertheless, the framers of the Constitution did not venture to give the new federal government a single jot or tittle of economic authority beyond the limits of actual necessity. They gave Congress the power to tax, but circumscribed this taxing power with three severe restrictions. Federal taxes, they provided, must be uniform; must not be levied on exports; and if direct, must be apportioned among the states according to their respective populations. So with the commerce power. Trade with foreign nations and among the several states might be regulated by Congress, but no preferences among ports would be tolerated and the whole field of trade within each state was left to local self-determination.

The Constitution, accordingly, is eloquent in its economic omissions. There is no mention of banks or banking. It was assumed that the power to charter and to regulate banks would devolve upon the states along with all the other non-delegated powers. So with the issue of paper money. Congress was given exclusive control of the coinage, but no express authority to issue bills of credit. All this points to a full recognition of the jealousy with which the states regarded their own economic independence. Any attempt to set up a central govern-

ment which obviously could exert a dominating influence over the financial and commercial affairs of the nation would have roused the states to a rejection of all that the convention proposed.

So the makers of the Constitution proceeded cautiously. They gave the new federal government, in express terms, that small modicum of economic authority that seemed to be imperative at the moment, leaving the rest to the individual commonwealths. Nothing could have been further from their minds than that even this small endowment of authority would enable the federal government in due course to control the prime interests of agriculture, manufacture, trade, communication, banking and credit throughout the length and breadth of the land. Certainly there is no such implication in the original document, especially when one joins with it the explicit declaration of the Tenth Amendment.

The government of the United States, at its inception, was a weak government. It was weaker than the leaders of the convention desired. The powers assigned to it were not those which they thought the federal government ought to have, but merely those which they hoped the states would consent to give. There were those who doubted that these powers were enough to produce any substantial amelioration in the existing economic confusion. Hence the first

few years of the Constitution were its critical years. If Washington's first administration had failed to utilize every ounce of its power to improve the economic situation the revival of material prosperity would have been delayed and there would have been a general disillusionment. As it was the new government rode into the confidence of the people on a wave of economic prosperity which it helped in large measure to create. It found men who had the discernment to see that a union could not be strong unless its people were prosperous, and that national unity could be best promoted by a common interest in national economic legislation.

During the past hundred and forty years many minds have helped in the making of the unwritten constitution by drafting and enacting organic statutes, by framing administrative and judicial opinions, by setting precedents, and by developing habit into usage. Their number runs into the thousands. But among them there are four great historical figures whose work may be singled out as of conspicuous and enduring importance. These are Alexander Hamilton, John Marshall, Andrew Jackson and Woodrow Wilson. They, not less than Washington, Madison, Franklin, and Morris, are entitled to be known as Fathers of the Constitution in the broader sense of the term. Hamilton took hold of the economic provisions, gave them reality, and

made them function. He seized the right psychological moment to start Congress on its way to supremacy in the economic life of the nation. A dozen years later it would have been too late. Marshall, during his long term as Chief Justice, reinforced Hamilton's work by widening the implied powers of the national government and making the Supreme Court their guardian. To Andrew Jackson we are indebted for having infused into the American political system a large part of the democracy which the framers of the original document did not intend it to possess. Finally, Woodrow Wilson demonstrated the latent powers of the chief executive and set presidential leadership upon a new plane.

The average mind does not readily grasp or hold abstractions. An achievement is best presented to most imaginations by associating it with a personality. That would seem to justify an endeavor to portray the makers rather than the making of our unwritten constitution. Such an endeavor will at least serve to demonstrate that government, in the last analysis, is not a matter of laws or of men alone, but of both functioning in unison and each influencing the other. Hence biography, as well as the statute book and the law reports, must form the basis for its intelligent study.

I

Alexander Hamilton and the Economic Supremacy of the Federal Government

I

Alexander Hamilton and the Economic Supremacy of the Federal Government

A WRITTEN constitution is but a scheme on paper. It sets the form of government; but the form of a government is of less consequence than its spirit, for it is the spirit that giveth life.

Among those who have given life to the language of the Constitution Alexander Hamilton was the first in point of time, and the existing government of the United States owes more to him than most people realize. He was a member of the Philadelphia Convention, but was absent from most of its sessions and exerted relatively little influence when he was there. An examination of the general plan which he presented as the basis for a constitution will show how far removed were Hamilton's political views from those of his colleagues in the convention. To the making of the original document, therefore, it can fairly be said that Alexander Hamilton contributed little more than his signature. In appending this signature he was able to remark with truth that no man's ideas were more remote from it than his own.

But Hamilton's work in getting the Constitution ratified by the states was of greater value than that of any other man. He swung New York into line and no Union could have been solid without this great commonwealth which lay right across the country with four states to the north of her and eight to the south. Greater still, in point of importance and enduring value, was Hamilton's work after the Union had become a going concern. He set out to gain for the Constitution a secure place in the hearts of his countrymen by making it appeal to that intelligent self-interest which has been in all ages one of the great motive forces in political progress. Hamilton realized, more clearly perhaps than any other statesman of his time, that however weak the new federal government might be, it had at least the potentialities of strength, and these he proceeded to utilize with rare audacity.

Alexander Hamilton, as is well known, was not a native son. He was born on the island of Nevis in the British West Indies. His father was an unprosperous Scotch merchant and his mother a brilliant woman of French Huguenot family. From one side of the house, accordingly, he derived an interest in trade and finance; from the other his scintillating intellect and uncommon versatility.[1] At the

[1] I am not unmindful of the doubts cast upon Hamilton's paternity; but they do not appear to be well-founded.

age of fifteen he came to New York, and entered King's College (now Columbia University); but before he had finished his course the Revolutionary War began. Even before the first shot was fired at Lexington, Hamilton cast in his lot with the colonists, and when military operations began he entered the army. Attracting the attention of Washington by his alertness he was taken on the personal staff of the commander-in-chief as military aide and secretary although he was then only twenty-one years of age.

During the war Hamilton displayed some indications of military genius, but in a subordinate position he obtained no opportunity for gaining a large military reputation. Anyhow, he was a Hamilton from Nevis, not a Bonaparte from Corsica. His flair was for the pen, not the sword. Even while the war was being waged he wrote considerably, including various disquisitions on government and finance. In 1780, for example, he sent to Robert Morris a letter urging the reorganization of the currency and the establishment of a national bank. Repeatedly he talked with Washington on these topics, and the impression made during these conversations was still vivid in Washington's mind when the time came to form the first cabinet of the United States.

The choice of a Secretary of the Treasury was perhaps the most important appointment that Wash-

ington had to make on his accession to the presidency. The new government was literally without a dollar. Financial and commercial problems of extreme difficulty were demanding immediate attention. His thoughts naturally turned to Hamilton for this post, yet Hamilton was by no means a logical selection. He was still young, only thirty-two; but, as Bacon once said, "a man who is young in years may be old in hours if he has lost no time." Moreover, he was wholly without experience in finance of any kind; he was thought to be visionary; and there was no probability that his choice for this vital post would command public confidence. Far from being a success in the management of his own personal fortunes, Hamilton was virtually penniless when he took the oath of office. On the other hand it could not be denied that Hamilton had ideas; he was clear in his processes of thought, he had courage, he was a tireless worker, and Washington had the utmost confidence in his personal loyalty. This last consideration doubtless weighed heavily with the President. At any rate Hamilton was appointed Secretary of the Treasury, and, as the outcome proved, no more admirable selection could have been made.

Washington took the risk and deserves the credit. In evaluating the credit to be given Washington for this appointment, moreover, it should be pointed out

that the office which he entrusted to Hamilton was at that time far more analogous to that of the English Chancellorship of the Exchequer than it has since become. It was understood that the Secretary of the Treasury would take the lead in shaping the financial and commercial policy of the government, —so clearly was this understood, indeed, that Congress, immediately after Hamilton's appointment, adopted a resolution directing him to prepare and report a plan for the revival of the public credit with all that this commission implied. Congress thereby entrusted him with a measure of initiative which it has rarely committed to any member of the executive branch.

When Hamilton set his hand to the task of bringing order out of the monetary and commercial chaos he had no background of American experience to rely upon—save insofar as American experience might indicate what to avoid. He apparently turned to no one for advice, and in fact there was no one to whom he could have turned. The new Secretary went into office with some fairly definite ideas as to what was needed, and to the extent that he sought the help of others it was not for the purpose of securing new ideas but of getting his own carried out. He was a leader of men in the sense that he preferred to command rather than to consult, confer, or confide.

Hamilton's economic doctrines were wholly consistent with his political theories, in fact they were a corollary from his reflections on government. He was a stalwart believer in centralization, whether as applied to the political or the economic structure. It cannot be said, however, that he had anything more than a very general philosophy of either politics or economics, for although he was a man of great industry who chose "to scorn delights and live laborious days," yet he had at times a marked impatience with details. He initiated much but invented little. With all his brilliancy of intellect and courage of conviction, Hamilton made little or no real effort to secure the adoption of anything distinctive or original; on the contrary, he merely adapted to American conditions a variety of measures which had been thoroughly tested in other countries, especially in England. Even the remarkable "Draft of a Constitution for the United States," which he presented to the Philadelphia Convention in 1787 was largely an adaptation of English political ideas and practice.

Now, as Secretary of the Treasury, Hamilton turned once more to England for financial guidance, but not necessarily because he was an Anglophile; it was simply because there was nowhere else to turn. France, in the years 1789-1793, was in utter financial discredit and distress. The other continental

countries were in varying degrees of financial difficulty. So Hamilton felt constrained to use the British practice of his day as a starting point, making such deviations from it as the special conditions of the new republic appeared to demand. On the whole this was safer than trying to start anew, for he had the work of Pitt to serve as a foundation and there was need to move quickly. Hamilton knew, moreover, from his acquaintance with English history, that the Bank of England had been a powerful factor in giving virility to the Whig government after the English Revolution of 1689. He wanted a like service performed in the United States, which is another way of saying that he turned to England's experience because he was thinking not only in terms of finance but of politics.

Three landmarks of Hamiltonian policy stand out in bold relief after the lapse of a hundred and forty years. Taken together, they contributed mightily to the strength, prestige, and influence of the new central government. These three outstanding measures were, first, the funding of the debt, including the assumption of the state debts; second, the establishment of the first United States Bank; and, third, the inauguration of a protective tariff. These three measures made full utilization of the three most important powers given to the federal government by the new Constitution, namely, the power to tax,

the power to borrow, and the power to regulate commerce.

Of these the borrowing power was the first to be requisitioned, because the rehabilitation of the national credit was the most urgent of all the urgent needs. The public credit could hardly have been at a lower ebb than when Hamilton took office. During the Revolutionary War the Congress of the Confederation had borrowed money, both at home and abroad, on all sorts of terms and conditions. This money had been loaned on good faith, to a government that had no certain revenues from which to make repayment. It had no dependable income, indeed, from which to pay interest on these loans; and after the war was over it ceased to make such annual payments. In a word, the government of the United States was in complete default on its obligations. Accordingly its bonds dropped to a small fraction of their face value and although they rose somewhat with the formation of the new Union they were still below par when Hamilton attacked the problem of refunding them.

Viewed in the light of modern financial operations the national debt of the United States in 1789 seems absurdly small. Foreign indebtedness, with unpaid interest added, was less than twelve million dollars. Domestic indebtedness totalled about forty millions. Then there was also some floating debt,

which brought the grand total up to fifty-five millions or thereabouts. No difference of opinion existed as to the advisability of having the nation assume these federal obligations, although some question was raised as to whether both principal and overdue interest should be funded on an equal basis.

But this was not all of Hamilton's funding problem. There were state debts which had been incurred in the cause of independence. All the states had borrowed money, in varying amounts, and on different terms. These debts, amounting in their totality to about twenty-five millions, were a heavy burden upon the new state governments which naturally felt that since the indebtedness had been incurred in a common cause it should now be assumed by the common agency which the states had set up.

A man of less vision and financial audacity than Secretary Hamilton would probably have tried to scale down and compromise these various obligations—after the manner of European ministers of finance in our own day. That would have delayed matters and kept business in uncertainty. Hamilton quickly decided that all the indebtedness of both nation and states, including defaulted interest and unliquidated claims, should be assumed in full by the federal government. He was anxious to undertake this inclusive funding operation, not merely as

a matter of justice but as a matter of expediency. In all justice the debts should be assumed as the price of independence—without quibbling or pleas in avoidance. In all expediency, Hamilton believed, the new federal government must seek to entrench itself in the confidence of the states, allay their suspicions, and prove that it could be their benefactor. Here was the opportunity to do it.

Nevertheless the immensity of the undertaking required more courage and optimism than most of Hamilton's contemporaries possessed. To shoulder at one stroke all the indebtedness of the Confederation, without any scaling down, and to assume the variety of obligations incurred by the states in the common defence, making in all a debt of eighty millions or more—this step seemed like tying a millstone around the neck of the new federal government at its very inception. Hamilton's critics predicted that such action would burden the national government with an annual interest bill which would absorb all its revenue.

Madison was dubious. So was Gallatin. But Hamilton in his *Report on Public Credit* (presented to Congress in January, 1790) declared his conviction that the total burden, although it seemed stupendous, would prove to be well within the resources of the United States. The national wealth would quickly expand. He also anticipated a fall in the

rate of interest, in which he was correct as the event proved. Moreover, an arrangement could be made to defer for ten years the initial payment of interest on part of the funded debt. Meanwhile the national revenues would grow—which they did. Hamilton alone, among all the statesmen of 1789, envisaged the rapid growth of national wealth and income which came within a relatively few years. The new government ran full tilt into a wave of economic prosperity which it did not create, of course, but which Hamilton's work served to accentuate in vigor and volume.[1]

It has sometimes been said by his unfriendly biographers that Alexander Hamilton was ready to burden the new republic with a national debt in perpetuity, because he believed a national debt to be a sort of dispensation from Providence. No other aphorism has been more widely attributed to Hamilton than this: "A public debt is a public blessing."

[1] In 1791 Thomas Jefferson commented on this as follows:

"In general, our affairs are proceeding in a train of unparalleled prosperity. This arises from the real improvements of our government, from the unbounded confidence reposed in it by the people, their zeal to support it, and their conviction that a solid union is the best rock of their safety, from the favorable seasons which for some years past have cooperated with a fertile soil and a genial climate to increase the productions of agriculture, and from the growth of industry, economy and domestic manufactures; so that I believe I may say with truth that there is not a nation under the sun enjoying more present prosperity, nor with more in prospect."

Hamilton, as a matter of fact, neither said nor believed anything of the sort, although it is true that on one occasion he used language which could readily be misconstrued into praise of national indebtedness *per se.* In his *Report on Public Credit* he declared that the funding of the existing debt would "render it a public blessing"; by which he doubtless meant that such action would serve as a stabilizing factor politically. It would, in a sense, be a hostage for the preservation of the new Union. It is hardly justifiable to conclude from this statement that Hamilton believed in the value of public debts at all times and under all circumstances. On the contrary he expressly advised, in the same *Report,* that the creation of a national debt should be accompanied by adequate measures for its liquidation, and provision for a sinking fund was made an integral part of his funding plan. Surely he would not have done this if his partiality for enduring public indebtedness were as strong as it is sometimes alleged to have been.

In any event Hamilton was accurate in his forecast of the political consequences of his financial audacity. The completion of his funding plan not only unlocked large resources which had been immobilized as claims against the national and state governments by converting them into negotiable securities, but it created a great vested interest in the new

government on the part of many influential groups —the merchants, ship-owners, holders of securities, and even the farmers to some extent. It drew the creditors of the states into a certain dependence upon the vitality of the federation. It showed the states that the new national government provided an agency through which helpful economic legislation, far beyond the competence of the individual commonwealths, could be put through. National prosperity and national politics had become interlocked. The value of this alliance, during the infant years of the Republic, can hardly be overestimated.

But not all the credit belongs to Hamilton, for Jefferson came to his assistance at a critical juncture when it appeared that Congress would stand firm against the assumption of the state debts. The House of Representatives, indeed, had rejected that part of the scheme. The Great Virginian, who as yet had not discovered how widely his political philosophy differed from that of Hamilton, lent his sponsorship to a compromise by which some of the southern congressmen relaxed their opposition to the funding of state indebtedness in return for an assurance that the new national capital would be located on the northern border of Virginia.

Fourteen senators and thirty-two representatives voted to put Hamilton's funding measure through Congress. Of these, it later developed that the

majority were themselves holders of public securities which were bound to be enhanced in value by the outcome. This fact prompted Jefferson, long afterwards, to speak of the funding measure as a "pabulum to the stock-jobbing herd." But it is hardly necessary to assume that because many legislators who voted for the Grand Bill were holders of public securities, their attitude on the measure was self-evidently dictated by this circumstance. Many (though not so many) who voted against the assumption of state debts also had such securities on hand. So the argument cuts both ways. The truth is that most men of substance in all the thirteen states had been constrained to buy these bonds as a matter of faith and patriotism in times of national exigency. What proportion among the members of Congress would have been found without Liberty Bonds among their assets in 1920? And will some meticulous historian in the twenty-first century proceed to demonstrate that here is the key which explains the financial legislation of the past ten years?

The second of Hamilton's great financial achievements was his establishment of the first United States Bank. The idea of a great central bank, like the Bank of England, was not a new one. Hamilton himself had made some suggestions along this line many years before. Now, as Secretary of the Treas-

ury, he was able to present a fully-matured scheme, which he did in the late autumn of 1790. Hamilton believed that a strong central bank, with branches in different parts of the country, would serve a number of useful purposes; it would facilitate the collection of the revenue, help stabilize credit, provide loans to industry, bring hoarded currency into circulation and induce the investment of European capital in America.

But he did not want a "government bank." His plan called for a bank under private ownership and control. Such ownership and control, Hamilton believed, would afford the only dependable assurance of careful and prudent administration. The government might be a stockholder, and should have general supervision of the bank; but he held firm to the principle then embedded in the Bank of England, namely, that the best results could be had from a private institution serving as a public agent.[1] Hamilton definitely linked up the first United States Bank with his funding operations by providing that public securities would be received in payment of private subscriptions for three-fourths of the stock.

The chartering of this bank marked the first overt act in the stretching of the new federal government's authority. It was the first application of

[1] The capital was fixed at $10,000,000, of which the government might subscribe for one-fifth.

the "implied powers" doctrine. For the Constitution, as has been said, gave Congress in express terms no right to establish a bank or to issue paper money either directly or through the agency of a bank. A proposal to give Congress authority "to grant charters of incorporation" was made by Madison in 1787, but did not find favor at the hands of the Constitutional Convention. Nevertheless, it was Hamilton's contention that the right to raise and collect taxes, to borrow money on the credit of the United States, to regulate foreign trade and to provide for the common defence—that each and all of these express powers carried the implied right to establish suitable agencies for the collection of revenue, the marketing of bonds, and the financing of commercial transactions. In addition Hamilton argued that the right to charter corporations was a right inherent in every sovereign government by reason of its sovereignty. And as for the issue of paper money, it was a time-honored method of resourcing public authority, and in Hamilton's opinion came within the general power to borrow.

Jefferson, however, was of a different mind. He took his stand on the proposition that Congress had no powers except those expressly granted in the Constitution plus the power to make laws "necessary and proper" for calling these express powers into effect. Chartering a bank was neither a necessary nor a

proper step, but merely one that might turn out to be convenient. And the Constitution did not give the national government any right to choose among agencies of power on the basis of mere convenience.

Hamilton and Jefferson were both members of Washington's cabinet at this time, the latter being the senior as Secretary of State. The President gave full consideration to the arguments of both and ended by siding with Hamilton. He signed the bank bill on February 25, 1791, and a few months later the stock books were opened. At once there was a rush to get the "script," as the bank stock was called, and the whole capital was subscribed, at $400 a share, within a couple of hours. Then the stock went away above par and the operation was regarded as an amazing success, more particularly by the thousands who were foresighted enough to get in on the ground floor.

The importance of this step as one of the starting points in the rise of the federal government to a position of supremacy in the economic life of the nation would be hard to exaggerate. It charted a path from which the national government has never been permanently diverted. It is true that the First Bank ultimately closed its doors, and so did its successor, the Second Bank, on which Andrew Jackson waged his warfare. But meanwhile two things had been definitely established: first, the constitutional

right of Congress to establish a bank or banks with authority to issue paper money; and, second, the idea that banking institutions under national control could be useful in aiding the government to float its bonds in time of emergency.

This idea was seized upon by Secretary Chase during the dark days of the Civil War and became the inspiration of the National Banking Act of 1863, a measure which tied bank notes to government bonds with an enduring rigidity. This national banking system served the needs of the country for a full half-century when it was supplemented and reinforced by the federal reserve bank system as we have it to-day. Through the intermediary of the Federal Reserve Board and the boards of the twelve regional banks, the whole credit system of the country, both public and private, has been given a flexibility that it did not possess a few years ago, and incidentally an unquestioned supremacy in the field of banking has been assumed by the federal government. The control of the agencies of rediscounting, and of rediscount rates, is sufficient to guarantee the maintenance of this supremacy under all normal conditions. No two statesmen were ever more unlike than Alexander Hamilton and Woodrow Wilson. But what Hamilton began in 1791, Wilson completed when he signed the Federal Reserve Act of 1913.

The dominating rôle of the national government in the field of banking and credit is beyond all question to-day. And it has been extended, during recent years, into the field of foreign borrowing. The Constitution, of course, says not a word about the right of any federal authority to veto the exportation of capital or credit by private American investors. Nor was the expediency of such action ever asserted until after the World War. During all the years from 1790 to 1917 America was a debtor nation, not a creditor nation; an importer, not an exporter of capital. It is only within the past dozen years that our position has become reversed. And with this reversal of status the State Department has let it be understood that the national authorities expect to be consulted when large loans to foreign governments or foreign corporations are proposed to be made by American financial organizations. It cannot prohibit the making of such loans; but it can advise against them, which in practice virtually amounts to a veto. In this way the national government has acquired what amounts to a censorship of foreign borrowing in the United States, thereby enabling it to give a new twist to the meaning of "dollar diplomacy." Financial pressure can be added to moral suasion. "Who holds the purse holds the power," as Madison once said. It is as true in diplomacy as in domestic politics.

Finally, we have the third of Hamilton's great contributions to the development of the national government's control over American economic life—his inauguration of the protective tariff. Congress, in the early days of 1790, adopted a resolution asking the Secretary of the Treasury to give attention "to the subject of manufactures, and particularly to the means of promoting such as will tend to render the United States independent of foreign nations. . . ." In compliance with this request Hamilton prepared and presented, in the following year, his famous *Report on Manufactures*. The importance of this state paper as the basis of protectionist policy in the United States is undeniably great, as every student of economic history realizes. Hamilton's fiscal philosophy has provided the very cornerstone of the whole protectionist structure for one hundred and thirty-nine years. The *Report on Manufactures* is in two parts, the first dealing with the reasons why the author believed the official encouragement of American manufactures to be imperative, the second giving a résumé of the specific branches of industry which seemed to need and to deserve encouragement.

Hamilton was a realist. He did not regard protection as an ideal economic policy; but in the case of the United States he believed it to be dictated by four weighty considerations. The first was polit-

ical. He was afraid that sectionalism, if left to grow, might rend the nation apart, whereas the development of a home market for agricultural products, through the growth of protected manufacturing centers, would tend to unify it. Each section would become dependent on the others and concerned with the prosperity of the others. The second consideration was economic. Hamilton believed that a purely agricultural country could never achieve the degree of wealth and prosperity which might be had when agriculture and industry were conjoined as great national activities. He was led to this conviction by his study of history. Purely agricultural countries had always remained poor and weak, while countries with a diversified economic life had waxed rich and strong.

His third motivating consideration was international. Recalling that the lack of military and naval supplies had been a great handicap during the Revolutionary War, Hamilton felt that the encouragement of manufactures by means of a protective tariff would contribute substantially to the national defence. It would foster shipbuilding and the rise of certain industries which in time of war could be diverted into military channels. Finally, and not least in point of importance, there was the fiscal problem. The new government needed revenue. In fact it needed revenue more urgently than it needed

anything else. The Constitution provided an easy way to obtain this revenue by indirect taxation, that is, by taxing imports; on the other hand, it made no provision for getting federal revenue by direct taxation except in a clumsy and inequitable way, namely by apportioning the direct taxes among the states according to their respective populations—not according to their area or wealth. Hamilton fully realized, of course, that the new national government would make a bad start if it began by levying direct taxes upon the states. Prominent among the merits of a protective tariff, therefore, was the fact that it promised to yield a considerable income without rousing opposition among the state governments. In a word, protection seemed to be good politics.

Hamilton's initial tariff, however, was not a highly protective one. It was moderate in its scale of duties. But it inaugurated both a practice and a point of view to which the people of the United States have clung with varying degrees of tenacity ever since. The protection of American industries "against the cheap labor and low standards of other countries" is a principle which seems to be as deeply imbedded in the public mind as though it had been set up by an express admonition of the Constitution itself. Like the Monroe Doctrine, it has become invested with the sanctity of tradition. Protection

is a feature of our unwritten constitution if anything is. Both political parties are committed to it. Free trade has ceased to be an issue in America: it has almost ceased to be a dream among professors of political economy.

And what far-reaching results this long-continued policy of protection has had! There is no branch of our economic life that has not been profoundly affected by it. The acceptance of the national Constitution did not of itself guarantee either national unity or national prosperity. Both had to be achieved by using the methods of practical statesmanship. It is sometimes said that no other Secretary of the Treasury ever had Hamilton's golden opportunity for constructive work—which is true; but an opportunity to succeed always provides an opportunity to fail. Alexander Hamilton, had he been some other kind of fiscal builder, might have put too weak an underpinning beneath his elaborate structure, with an inevitable collapse in later years. He might have been found wanting in courage, or in sagacity, or in both. But never has any critical juncture in American economic history been better provided with a man for the hour. Hamilton had the vision to discern and the strength to fulfill.

He realized that the distribution of power must follow the distribution of property, and hence that the moneyed interests must be rallied to the side of

the new government. He saw that prosperity would be the handmaid of unity. It is true that there were imperfections in Hamilton's work and that some of it eventually had to be undone; but he reared a framework that stands unchanged and as a whole his measures have met the supreme test of soundness. They survive. It is probably not too much to say that for her financial and industrial hegemony of to-day, America owes more to Alexander Hamilton than to any other man.

II

John Marshall and the Achievement of Nationalism

II

John Marshall and the Achievement of Nationalism

MUCH has been written about John Marshall as a judge. He was in truth the greatest American jurisconsult of his time, or perhaps of all time. But Marshall was a statesman as well as a judge. He used his judicial position and influence to bring public policy into unison with his own political views. In our tributes to Marshall as a judge we have been prone to forget that the essence of judicial greatness is non-partisanship and a rigidly objective attitude toward the questions at issue. And Marshall can hardly be termed a non-partisan. Indeed if he had been rigidly objective in his attitude toward the outstanding constitutional issues that came before him for decision he would probably have attained no such place in history as that which posterity has rightly accorded him.

Marshall was a Federalist in politics, a partisan in an age when partisan controversies assumed an acute form. He stepped upon the Bench from a post in a Federalist cabinet, and he did not leave

his political inclinations behind him. He was a nationalist, first, last, and all the time. More than a quarter century after his appointment to the post of Chief Justice, the ardor of partisanship still burned so strongly within him that he was publicly quoted as saying: "Should Jackson be elected, I shall look upon the government as virtually dissolved." It is true that Marshall tried to allay the widespread suspicion that his decisions were being influenced by party considerations, and to this end refrained from voting at any presidential election for twenty-four years; but this quadrennial self-effacement was not born of any decrease in the intensity of his own partisan convictions.

A great statesman is one who successfully uses the tools at hand, whatever they are, to achieve ends which he sincerely believes to be for the ultimate best interest of his country. Under that definition Marshall qualifies. His superb talents were beyond denial.[1] His mission was the strengthening of the federal government; and no wonder, for he himself had borne hunger and cold at Valley Forge at the behest of a government which did not have the strength to keep its soldiers fed or warmed. His apparatus consisted of the Constitution and the Court. His method was that of judicial interpreta-

[1] Albert J. Beveridge, *Life of John Marshall* (4 vols., Boston, 1919), Vol. IV, p. 463.

tion. His achievement was the subordination of state sovereignty to nationalism. And the by-product of his work was the elevation of the Supreme Court to the status of a coördinate branch of the government.

Marshall's starting point was provided by the silences of the Constitution. This taciturnity was largely due to two practical considerations—the fact that the Constitution was virtually without precedent, and, second, the desire of its framers to avoid a four-square decision on various controverted matters. Now one of the functions of a judge is to supply the incidental omissions of a statute, to bridge the gaps which the legislators leave. That must necessarily be a duty of the courts so long as lawmakers are forgetful, careless, or otherwise human. Marshall pressed the idea a step further. He found the organic law, the Constitution, full of silences which had to be made articulate. And his initial task was to assert the right of the Supreme Court to the exercise of this function.

The framers of the Constitution had been much concerned about the question of preserving the apportionment of power between executive and legislative, between the nation and the states. They realized that while governmental authority might be nicely balanced at the outset, it was not likely to stay so. The history of all previous governments

had shown the inevitable overpowering of one branch by the other. How could the equilibrium be preserved in America? Two proposals were laid before the Convention and rejected. Hamilton urged that the national government be allowed to appoint the governors of the states, and that these governors be authorized to "negative" state laws. Thereby, he believed, the states could most surely be prevented from impinging upon the powers of Congress. This proposal was rejected, and quite wisely, as events have proved.[1]

Another proposal, fathered by Edmund Randolph, was to set up a council of revision, composed of the federal executive and judiciary combined, with a like power of veto over acts of the national legislature. This proposition was likewise rejected as imposing on the judiciary a non-judicial function. "Judges should not decide on the policy of public measures," said Elbridge Gerry. A majority of the Convention believed that the Randolph proposal "involved an improper admixture of powers." In the end the President was given the right to veto acts of Congress (subject to repassage by a two-thirds vote) and nothing was written into the Constitution with reference to a judicial nega-

[1] It is interesting to note that Hamilton's proposal was adopted, in substance, by the makers of the Canadian Constitution in 1867. See the author's volume entitled *American Influences on Canadian Government* (Toronto, 1929), pp. 18-20.

tive. This important issue was left to be settled by time and circumstance, in other words by the terms of the unwritten constitution.

Many pages have been devoted in many books to a discussion of the question whether the framers of the Constitution intended the federal judiciary to have the power of annulling acts of Congress as unconstitutional. This is not the place to survey or recapitulate that controversy. It is enough to point out that during the debates on Randolph's proposed council of revision it was several times asserted that the judges would have, as judges, the right to nullify laws which they believed to be unconstitutional, and these assertions were not denied. If there existed, among the delegates, any aversion to having the judiciary assume this power, the long debates would seem to have afforded a natural place for such opposition to have disclosed itself. But no such judicial limitation was proposed at any stage.

Furthermore, although it is often said that the Constitution gives the Supreme Court no express power to declare laws unconstitutional, that power would seem to be an inescapable corollary from three provisions taken together: First, the Constitution is declared to be the supreme law of the land (Art. vi); second, the judicial power of the United States is vested in a Supreme Court (Art. iii, Sec. 1), and, third, the judicial power of the United States

is extended to all cases arising under the Constitution (Art. iii, Sec. 2). Taking these three clauses in their plain connotation, there is at least some basis for the contention that the guardianship of the Constitution is *expressly* conferred upon the Supreme Court by the Constitution and was intended to be so conferred.

In any event neither the principle nor the practice of judicial supremacy was unknown to the framers of the Constitution in 1787. Repeatedly, before the Revolution, the colonists had branded various acts of Parliament as unconstitutional and void, alleging that these statutes were contrary to Magna Carta, to the common law of England, and to the natural rights of man. Repeatedly the English Privy Council, in its judicial capacity, had disallowed colonial laws. In at least six instances, between the Revolution and the framing of the federal Constitution, various state courts held state laws to be unconstitutional and void. In 1780, for example, the Supreme Court of New Jersey invalidated an act of the New Jersey legislature providing for the trial of certain cases by a jury of six men on the ground that trial by jury, as stipulated in the New Jersey constitution, required a jury of twelve men (Holmes *vs.* Walton). And just before the Constitutional Convention assembled there was a Rhode Island decision which, by clearly raising the issue of

judicial supremacy, caused much discussion all over the country (Trevett *vs.* Weedon).

Beyond question the delegates at Philadelphia were aware of these decisions. Many delegates referred to the possibility, and indeed the probability, that acts of Congress would occasionally be declared unconstitutional by the federal Supreme Court. No delegate, during the entire Convention, denied the existence of this power, although some of them expressed disapproval of its exercise.[1] If it had been their intent that the federal Supreme Court should have no power such as the supreme courts of the various states were actually exercising, it is reasonable to suppose that they would have so stipulated. For they stipulated against many things much less in prospect—for example, the possibility that the states might grant titles of nobility.

Most students of constitutional law, at any rate, are now of the opinion that if the framers of the Constitution did not intend to give the Supreme Court its power to declare laws unconstitutional, they at least had no contrary intent. They consciously left the issue to the future for settlement. Hence it would have been easy for the Supreme Court to have evaded the embarrassing responsibility of nullifying any act or resolution of Congress

[1] See Charles Warren, *The Making of the Constitution* (Boston, 1929), p. 335.

if it had been minded to do so. During the first few years of its existence, in fact, it seemed quite disposed to follow that course. On one occasion, in an early decision, the Court expressed doubts as to whether it would ever venture to declare a national law unconstitutional, and it may well be that under the leadership of some one with a more nebulous national concept than John Marshall it would have found a way of permanently avoiding a conflict with the legislative branch of the government.

During the eleven years that elapsed before Marshall became Chief Justice only six cases involving constitutional questions came before the Court. The most important among these was the case of Chisholm *vs.* Georgia which concerned the power of a citizen to bring suit against a state in the federal tribunals. This decision caused much resentment, and led to the adoption of the Eleventh Amendment, but no question as to the constitutionality of a national law was involved in it. Nevertheless, the outburst which followed the Georgia case might well have deterred the justices from taking further and even greater chances with public opinion, especially in view of the fact that the Court was under heavy fire both in Congress and in the state legislatures. That such did not prove to be the Court's point of view was due in large measure to the courage and foresight of the great jurist who dominated its delib-

erations during the first thirty-four years of the nineteenth century. During these three-and-a-half decades he wrote decisions on thirty-six important questions of constitutional law.

John Marshall became Chief Justice in 1801. He was a Virginian by birth, a soldier of the Revolution, with a scant modicum of formal education. Although not a delegate to the Constitutional Convention in 1787 he worked hard and successfully in the Virginia Convention to secure the ratification of its work. Before he was forty-five years of age Marshall had held office in his own state and had served as a member of Congress from Virginia. For a short time he was Secretary of State in the cabinet of President John Adams, and by the latter was appointed to the Supreme Court in the outgoing days of his administration, only a few weeks before the inauguration of Jefferson. One of his first official duties, therefore, was to administer the oath to Jefferson as President, and he performed it with no lightness of heart, for Jefferson was to his mind a good politician in the worst sense of the term. And by a strange historic irony one of his last official duties was to administer the same constitutional oath of office to another President, Andrew Jackson, whom he respected even less.

Marshall took his seat as Chief Justice at the opening of the Court's first term in its new Wash-

ington quarters and held the post till his death in 1835. No other Chief Justice of the United States has held office so long, although Marshall's successor, Roger B. Taney of Maryland, came within a few years of it. Taney, moreover, tried hard to undo the nationalizing work that Marshall had done; but only to a small extent did he succeed, for his predecessor's legal philosophy had been too deeply implanted in the public mind. The law is conservative. When precedents have been set and built upon it is difficult to wreck them and rebuild.

Happily we have some good pen-portraits of Marshall. He was tall, thin, loose-jointed, with a small head, a swarthy complexion, and no elegance in demeanor or dress. One contemporary speaks of him as the very antithesis of the Chesterfield ideal. His voice was hard and dry; his style of delivery ineffective, yet he was among the most convincing speakers of his generation. This was because Marshall possessed a radioactive mind which could flash itself through all the intricacies of a controverted question and silhouette in clear outline the vital points upon which the issue hinged. Two things combined to make Marshall a great jurist—his power of analysis and his cogency in presentation. No American ever spoke or wrote English of greater force and clarity. Two things also combined to make him a great statesman—singleness of purpose

and personal integrity. Although a master of his mother tongue, Marshall was a silent man; he made few speeches and wrote few letters, indeed he wrote little apart from his decisions; at any rate relatively few interesting papers, reports, or memoirs of any consequence have come down to us from one whose public experience was so long and so varied.[1]

Senator Lodge once said that John Marshall stands in history as one of the small group of men who "have made nations." This may seem a strange statement, for Marshall was not one of those who signed the Declaration of Independence, neither was he one of those who framed the Constitution. Nevertheless, Senator Lodge was right. For it was Marshall who put vitality into the strip of parchment on which the nation was founded. He transformed words into authority. In his long series of decisions he was able to put the constitutional powers of Congress on a firm, explicit, and stabilized basis so that when the great crisis of the Civil War came the Constitution withstood the shock, much to the amazement of the outside world, including a great English historian who published in 1863 a *History of Federal Government* from the Achæan League to the Disruption of the United States. One of the most eminent authorities on American

[1] His biography of Washington, in five volumes, is not a work of conspicuous quality.

constitutional law has rightly said that Marshall's work alone saved the country from going to pieces in that tragic struggle of sixty-odd years ago, for it gave the supporters of the Union a clear and sound constitutional philosophy to stand upon. Truly, then, Marshall was one of the makers of the unwritten constitution, that constitution which is made up of interpretations and attitudes, traditions and usages, firm faiths and allegiances; not written with ink on any scroll, but stamped upon the minds and hearts of the people.

Marshall's leading constitutional decisions may be conveniently grouped under three heads: First, those which define the nature of the federal Constitution and its place as the supreme law of the land; second, those which relate to the status and powers of the national government and, third, those which deal with the position of the states and the nature of the restrictions placed by the Constitution upon them. Together these three groups of decisions embody Marshall's philosophy of constitutional federalism; they form a consistent and connected whole; they are all essential parts of a single juristic structure. The pillars of this temple are these:

1. *Nature of the Constitution.* The federal Constitution is an ordinance of the people, not a compact among the states. It is the supreme law of the land and the Supreme Court is its guardian.

2. *Powers of the National Government.* Although the national government is a government of enumerated powers, these powers are to be construed liberally and the national government is free to choose the means for carrying these powers into effect.

3. *Limitations on the States.* The national government acts within each state, not by the tolerance of the states, but by the supreme authority of the people of the United States.

The outstanding case in the first group of decisions, and indeed, the first instance in which Marshall had to render an opinion involving a constitutional question was the case of Marbury *vs.* Madison. This controversy, as every one knows, grew out of an appointment made by President John Adams on the very eve of his retirement from the White House in March, 1801. One Marbury was named by Adams to be a justice of the peace in the District of Columbia on March 2; the appointment was ratified by the Senate on March 3, and on the same evening his commission was signed and sealed but not delivered. On the next day (March 4, 1801) Jefferson was inaugurated as President and immediately instructed his Secretary of State, James Madison, not to deliver the commission. Marbury thereupon applied to the Supreme Court for a writ of mandate compelling Madison to make the delivery, and cited an Act of Congress, the Judiciary Act of 1789, which empowered the Court to issue such

writs against officers of the United States, including presumably members of the cabinet or even the President himself. The fundamental question, in other words, was whether an Act of Congress, if repugnant to the Constitution, could become the law of the land.

The Supreme Court could have avoided this question had Marshall and his associate justices been so minded. They might easily have ruled that Congress, in passing the Act of 1789, did not intend to include the President among those "public officers" of the United States against whom writs could be issued; but had in mind subordinate officers only. That would have left the constitutional issue untouched. Marshall was convinced, however, that the time for putting this issue to the test had come, and that the Court would hardly get a better opportunity at any future time. It was essential to determine the matter, he believed, because the question as to what power, if any, could annul an act of Congress was being debated in state legislatures throughout the land, and opinion seemed to be drifting toward a consensus on the Virginia-Kentucky proposition that any state or group of states had itself the right to declare a federal statute void and unconstitutional. To Marshall the acceptance of that doctrine would seal the doom of the Union.

Therefore the decision in Marbury *vs.* Madison

did not confine itself to the question whether a minor federal appointee should have delivery of his commission. It raised the whole issue of the Supreme Court's jurisdiction. On the minor issue Marshall held that Marbury's commission should have been delivered, and he vigorously criticized the action of President Jefferson in refusing to have it delivered; but on the larger question, whether the Supreme Court had authority to issue a writ to the President or his Secretary of State, Marshall ruled, with the support of his associate justices, that it had no such power. The section of the Judiciary Act which authorized the Court to mandamus the chief executive was beyond the power of Congress under the Constitution, and hence unconstitutional.[1] Thus Marshall proclaimed, for the first time in any Supreme Court decision, the right of this tribunal to invalidate an act of Congress. Not only did he enunciate this doctrine, but he supported it by a series of arguments and a chain of reasoning which have taken rank among the classics of jurisprudence. Here is his presentation in brief form:

The powers of Congress are defined and limited in the Constitution. To what purpose are these limitations put there, if Congress may at any time

[1] Beyond the power of Congress because the Constitution itself had expressly prescribed the cases in which the Supreme Court might exercise original jurisdiction (Art. III, § 2, par. 2).

overstep them? It is a self-evident proposition that the limitations of the Constitution are binding on the various branches of government, otherwise why a written constitution at all? If, then, Congress passes a law in defiance of limits placed upon it, must the courts nevertheless enforce such a law? The answer is No. It is emphatically the province of the courts to determine what is law and what is not law. A law repugnant to the Constitution is not law. It is no duty of the courts to enforce that which is not law. On the contrary it is their function to support and enforce the supreme law of the land, all other actions of any legislative body to the contrary notwithstanding. This is the very essence of judicial duty.

I have here condensed several pages of Marshall's decision into a single paragraph and thereby done him a grievous injustice; for the Chief Justice wasted no words in writing his opinions. The general proposition that the Supreme Court is a coördinate branch of the nation's government, the guardian of the Constitution, with power to invalidate an unconstitutional law—that proposition is a veritable commonplace of schoolboy civics to-day. But it was assuredly not a commonplace in 1802. On the contrary it was an innovation of the first magnitude. Jefferson protested that the decision raised the judiciary to a "despotic branch" of the govern-

ment, not a coördinate branch. Yet it did nothing more than to place the federal judiciary on a plane of constitutional equality with the executive and legislative branches, its powers and its independence protected by the Constitution as in the case of the others. If this decision had been rendered, and this claim set up, in a controversy arising over an attempted *reduction* in the court's powers, it would have been a more delicate matter. But the nature of the facts from which the case arose enabled the Court to set itself in the more easily defensible position of declining an *increase* of powers which Congress had endeavored to thrust upon it. Here was an opportunity that might never arise again—to seize a great power by declining to be vested with a lesser one.

All the way through this decision, indeed, Marshall showed himself not only a great jurist but a political strategist of the first order. By a single stroke he not only secured for his tribunal the greatest of all powers that it possesses to-day, but he forestalled all future danger of bringing the Court into direct conflict with the chief executive by being required to issue writs which could not possibly be enforced. This decision was also notable in the fact that the Court stood unanimous and undivided; there was no dissenting opinion. It showed that Marshall's leadership had become decisive.

In the second group of Marshall's decisions, those dealing with the nature and scope of the national government's powers, the outstanding one is the decision in McCulloch *vs.* Maryland (1819). At Alexander Hamilton's instigation Congress had chartered the first United States Bank. After the expiration of its charter, it chartered the Second Bank, and this bank established branches in the different states, one of them at Baltimore. The Maryland legislature then proceeded to lay a tax on the note circulation of the Baltimore branch which the cashier, McCulloch, acting under instructions, refused to pay. The question immediately involved was whether the State of Maryland had the right to tax bank notes issued by a federal bank, but this immediate question raised the larger issue as to whether the federal government had the right to charter a bank at all, or to authorize such bank to establish branches in the several states and to issue notes exempt from local taxation.

Here, again, the Court had to deal with another great silence of the Constitution, for that document gave Congress no express power to charter banks; it merely authorized the national government to levy taxes, borrow money, regulate commerce and do all things necessary and proper for carrying into effect these substantive powers. It was contended on behalf of the State of Maryland that these substan-

tive powers of taxation and borrowing were never intended to be so broadly construed as to permit the national government to charter a bank, and that even if Congress had power to charter such an institution it had no power to authorize a bank to enter within the territory of the states without their consent, to issue paper money there and to insist that these notes be free from state taxation.

This case brought before the court a notable array of legal talent. Daniel Webster appeared as one of the counsel for the bank, but did not make the main argument. Luther Martin of Maryland, who was among the framers of the Constitution in 1787, was now Attorney-General of his state and appeared on its behalf. The presentation of arguments on both sides lasted nine days and the case attracted the whole country's attention.

Within three days after the close of the arguments, Marshall handed down his decision. It is the longest and most masterful of all Marshall's judicial opinions. Apparently he spent much time in preparing this opinion; and if so, he must have set to work on it before the hearings were concluded. On the other hand much of the argument and some of the phraseology were taken from the addresses of counsel. The most notable epigram in Marshall's decision, for example, "The power to tax involves the power to destroy" is from Webster's

opening argument. At any rate Marshall condensed nine days of discussion into a summary which can be read in half an hour. No clearer or more unequivocal decision has ever been rendered by any court, and few decisions of greater importance have ever been given anywhere. The opinion of the Chief Justice in McCulloch *vs.* Maryland is the best short statement of the basic principles of American constitutional nationalism that has ever been framed. Even to-day, after the lapse of one hundred and ten years it has not been superseded.[1]

The Constitution, as Marshall pointed out in his decision, intended that Congress should have a choice among the means best adapted to the furtherance of legitimate ends. Let the end be legitimate, and the means plainly adapted to that end are constitutional. When Congress has a power it must be given liberty to choose its own instrumentalities. Hence it has power to choose a bank as one of these instrumentalities. And having chosen to establish such an institution it must be left free from state control, whether by taxation or otherwise. For the power to tax involves the power to destroy. If a

[1] In 1887 the Judicial Committee of the British Privy Council paid Marshall this tribute: "Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case."

state has power to tax a bank established by Congress it likewise has power to tax the mint, to tax the post office, to tax every agency of national government. Such power, if tolerated, would enable the states to tax the national government into impotence. The states have rights and powers: so has the nation. The supremacy of their respective laws, when they conflict, must be settled. Marshall then proceeded to settle the question in this case by declaring the Maryland tax law to be unconstitutional and void insofar as it sought to tax an instrumentality of the national government.

This decision was far-reaching in its implications. Marshall's brilliant biographer declares that in it the Chief Justice "rewrote the fundamental law of the nation," which is perhaps over-stating the matter.[1] In any event the decision aroused a storm of disapproval. It was branded as a "deadly blow at the sovereignty of the states"—which it undoubtedly was intended to be. Resolutions expressing dissent were introduced into Congress and the various state legislatures. There were threats of nullification, of secession, of armed defiance. But the storm passed. The decision in McCulloch *vs.* Maryland remained to mark the triumph of nationalism over state sovereignty. For the moment it put a damper on the

[1] Albert J. Beveridge, *Life of John Marshall* (4 vols., Boston, 1919), Vol. IV, p. 308.

philosophy of strict construction. It provided an exegesis of the Constitution upon which the North could rest its case during the Civil War, namely, the doctrine that the government of the United States is "emphatically and truly a government of the people," with powers emanating from them, to be exercised on them directly and for their benefit, not a government of powers emanating from the states. The states did not give and could not take away. This doctrine Marshall reinforced by his opinion in Gibbons *vs.* Ogden a few years later.[1]

A third great decision related to the scope and nature of the restraints placed by the national Constitution upon the states, and more particularly to the clause which provides that no state shall pass any law impairing the obligations of contracts.[2] The issue arose in what is commonly known as the Dartmouth College Case and was decided in 1819.[3] The facts in this case are simple and generally known, but they may be briefly recapitulated. Dartmouth College, in New Hampshire, had received a royal charter in colonial days, with provision for the administration of the college by a self-perpetuating

[1] 9 Wheaton, 1 (1824). This case was even more widely read than McCulloch *vs.* Maryland. It is a decision of prime importance, one of Marshall's best; but did not add much to the fundamentals of his constitutional philosophy.

[2] Article I, § 10.

[3] Dartmouth College *vs.* Woodward, 4 Wheaton, § 18 (1819).

board of trustees. Some years after the Revolution, friction arose between the trustees and the president of the college, culminating in the latter's dismissal from office. The controversy was carried to the New Hampshire legislature which presently passed a statute increasing the number of trustees and authorizing the governor of New Hampshire to appoint the additional ones. The statute also made various other changes in the college charter.

At once the constitutionality of the New Hampshire statute was attacked, particularly on the ground that the original charter of the college was a contract, with obligations which the state legislature had no right to impair. In due course this issue came before the Supreme Court of the United States where both sides of the case were argued with great skill. Daniel Webster, as is well known, appeared as one of the counsel for the college, his alma mater, and his emotional appeal has gained a niche in the history of American eloquence. Indeed there are many who know about Webster's plea in this case, but have little understanding of the facts, the issue, or the decision.

When the arguments had been concluded, the Court was divided. Marshall was clearly of the opinion that the college was a private, eleemosynary institution; that its charter was a contract, and hence protected by the federal Constitution against adverse

action on the legislature's part. But some of his associate justices could not see it that way. They were inclined to feel that the college was not a private but a public, or at least a semi-public institution, created for a public purpose, and that it should be subject to public control. The Court being divided, a decision was postponed for several months; meanwhile various conferences were held by the justices among themselves and with outsiders, particularly with Chancellor Kent of New York, whose opinions on legal questions commanded great respect.

In the end the doubters were won over to Marshall's point of view and the decision was announced. It is one of the most elaborate of Marshall's decisions, but perhaps one of the least convincing. The Chief Justice conceded that the English Crown, before the Revolution, could have amended the charter of the college or even revoked it altogether. He went even further, admitting that the New Hampshire legislature, prior to the adoption of the federal Constitution, could have done this. In either case there would have been a moral question involved, but not a constitutional one. The adoption of the national Constitution, however, had transformed a moral restraint into a legal one. It extended constitutional protection to all rights vested under private charters.

Marshall and his colleagues were probably influenced to some extent (as judges usually are) by the trend of the times. The era was one which seemed to be harking back to the days of the Shays Rebellion, so insistent was the demand that the state legislatures should be free to impair contracts in the interest of debtors and to the detriment of creditors. In the Dartmouth College decision Marshall sought to impress upon the country the need for strictly upholding the sanctity of contractual obligations.

Hence the decision took a rather extreme ground. It aroused once more the ire of Jefferson and his followers, who regarded the whole issue as one which raised the question whether the earth belonged to the dead or to the living. Assuredly the decision in the Dartmouth College Case involved dangers of a political character, for with the steady increase in corporate charters the hands of the various state legislatures could not be tied so firmly as Marshall seemed to hope. The legislatures would find some way of circumventing this restraint; and indeed the decision in the Dartmouth College Case suggested that they had full power, in granting new charters, to reserve the right of amendment or of revocation. This soon became the general practice. A few years after the Dartmouth College decision, moreover, the Supreme Court considerably modified the

rigor of its attitude by ruling that although the obligations of a corporate charter might not be impaired by overt action unless there was stipulation to that effect, it was within the power of a state legislature to give one corporation powers and privileges which in fact did not operate to impair the powers and privileges of an earlier charter.

On the other hand the Dartmouth College decision had some economic consequences of a highly advantageous character. It gave stimulus to the organization of corporate enterprises through the federal protection against local assault which seemed to be afforded. It gave stability to what had been regarded as speculation by reassuring corporate investors. Incidentally it tied this growing element of corporate investors more firmly in their allegiance to the nationalist point of view. There they have remained to the present day.

But the rule in the Dartmouth College Case did not remain the law of the land. Its vitality has long since been sapped away. Corporate charters, whether public or private, have been for several decades subject to change, control, and revocation by the states from which such charters are obtained. The states so provide in their constitutions or in their general laws. Nevertheless the decision rendered permanent service in that it made plain the potentially far-reaching character of the restrictions

which the national constitution had placed upon the sovereignty of the states. This was a much needed service, for the spectre of state rights, state sovereignty, the right to nullify, and the right to secede from the Union—this spectre was raising its head in 1819, although it did not come fully into view for a decade later.

Marshall died in harness, at the age of eighty, in 1835. Had he been succeeded as Chief Justice by some one whose interpretation of the Constitution was as clear and as strongly centralist as his own there is a possibility that the Civil War might have been averted, or at any rate more closely localized. But the selection of Roger Brooke Taney of Maryland as Marshall's successor changed the whole drift of the Supreme Court's decisions; for Taney was a protagonist of state rights and of strict construction. Accordingly, much of the ground which had been won before 1835 was lost during the next twenty-five years. Taney's decision in the Dred Scott Case did almost as much to break down the spirit of nationalism as Marshall's opinion in the Bank Case had done to promote it.

Yet this spirit of unity and nationalism did not succumb to the assaults of sectionalism and state rights: men argued the issue, went to war over it, and finally settled it at Appomattox. Hence the Civil War has sometimes been characterized as an

appeal from the decisions of John Marshall to the arbitrament of war. In a sense it was. And if that be so, Marshall won his case on appeal. Since Appomattox his dictum that the government of the nation is "emphatically and truly a government of the people," and not of the states, has never been seriously questioned.

Among Marshall's numerous decisions I have selected only three, but they are typical of the rest. They form a consistent body of juristic opinion. Marshall's opinions are more than monuments of legal reasoning; they are more, indeed, than an exposition of the nation's fundamental law: they embody the political creed of a great American statesman. Marshall saw, more clearly than anyone else of his generation, that an irrepressible conflict between nationalism and separatism was hovering on the horizon and that the future of the Union would hinge on the issue of this conflict. He desired it to be settled by peaceful, not by violent means, and he gave the best years of his life to that endeavor. It was not his fault that he failed to avert an attempt at secession.

Marshall knew the framers of the Constitution; he knew what was in their minds. He strove to vitalize their work; to make their words spell power; to give the Constitution resiliency, and to make it what it claimed to be, the supreme law of the land.

He was America's greatest jurist, and one of her greatest men. The proofs of his greatness still lie about us—in our history, our politics, our legal system, and above all in our national solidarity. When his life came to an end a nation had been made, and all the separatist forces of the next generation did not avail to disrupt it.

III

Andrew Jackson and the Democratization of the Constitution

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THE American system of constitutional government began one hundred and forty years ago; but the American system of popular government, as we have it to-day, is only one hundred years old. It began with the election of Andrew Jackson in 1828. That year marks the great dividing line between government for the people and government by the people. The accession of Jackson to the presidency was the most important single event in American history between the framing of the Constitution and the outbreak of the Civil War. It did not change the course of political development, to be sure, but it gave both direction and strength to what had been little more than a hazy aspiration.

Jackson was not the creator of the movement that has become inseparably associated with his name. It would be more accurate to say that he was the product of it. He rode into power on the crest of the wave that had long been gathering momentum, and which in 1828 attained a force

sufficient to sweep away the obstructing barriers. Jackson's success at the polls marked the triumph of the democratic principle and was an assertion of the people's right to change their government. In a few years, under Jackson's leadership, this revolution transformed the United States from an oligarchy ruled by the upper social strata of the seaboard states into a democracy dominated by the ideals of the common man.

The Constitution of the United States, as it left the hands of its framers, was not a democratic document. No one among the delegates at the Great Convention intended that it should be. The men who made up that convention did not, for the most part, have any genuine confidence in the wisdom of the masses. Alexander Hamilton, for example, was opposed to popular election, manhood suffrage, short terms of office, state rights and all the other appurtenances of democracy. Madison, Wilson, Franklin, and the other leaders of the convention were more liberally inclined, but they desired that the ship of state should be well ballasted. It was not their desire that the new government should be placed at the mercy of either one man or a million. They sought to establish a government that would endure, and to that end they endeavored to strike a fair balance between popular control on the one hand and constitutional restraint on the other.

Moreover, these men had to keep in mind the fact that their work would be altogether futile unless it could be subsequently ratified by the states, several of which were dominated at the time by the forces of conservatism. The new Constitution, unless it carried an appeal to the educated and propertied classes, could not have been adopted under conditions as they existed in 1787. Accordingly the Constitution did not, and could not, propose the establishment of a federal government which would be directly and completely under popular control. It was inevitably conservative in its provisions and represented a vigorous reaction against the ultra-democratic idealism which had been embodied in the Declaration of Independence. The Declaration was an appeal to human emotions; the Constitution was to be the law of the land.

During the past one hundred and forty-two years, however, a great deal of democracy has been infused into the Constitution of the United States, not by amending it, but by the action of the individual states, by judicial interpretation, and by the growth of usages which in some cases have virtually nullified the original provisions. The framers of the Constitution, for example, were almost unanimous in their conviction that the President ought not to be directly nominated or elected by the people. Colonel Mason of Virginia seemed to express the mind of

his fellow-delegates when he remarked that it would be "as unnatural to refer the proper character for chief magistrate to the people as it would be to refer a trial of colors to a blind man."

Yet they were equally averse to the idea of having the President chosen by the two Houses of Congress in joint session, as is the case with the President of the French Republic to-day. They feared that a president chosen by Congress would be the creature of Congress, and would not have that independence which the chief executive ought to possess in any scheme of balanced governmental powers. Accordingly they devised a plan which, as they thought, would effectually safeguard the country against the distractions and dangers of a nation-wide polling. Being well versed in the lessons of history, their besetting fear was that some day a demagogue would arise and sweep the land; hence their serious concern to work out a method of election which would put insuperable obstacles in the way of mere demagogues.

People nowadays do not always appreciate the extent to which the ghosts of historical tyrants from Dionysius to Louis XIV haunted the old brick hall in Philadelphia during this torrid summer of 1787. They flitted between the lines of every debate. Sir Henry Maine has said that the delegates took George III as their model of what an American

President ought not to be—that they made mental note of all the powers which this monarch had abused and then took pains to ensure that history should not repeat itself in the New World. If this be so one might suppose that they would have turned to popular election of the chief executive as the most invulnerable armament against tyranny; but they did not. "Mankind when left to themselves," said Washington, "are unfit for their own government." At any rate the Constitution, as it emerged from the convention-hall, made no provision for the election of the President by the people, either directly or indirectly. And it contains no such provision to-day.

"Each state shall *appoint*," the Constitution reads, "in such manner as the legislature thereof shall direct, a number of electors," etc. It would be entirely competent and constitutional for the various state legislatures to provide by statute that there shall be no popular voting for presidential electors, but that in each state the electors shall be appointed by the governor thereof. Nothing in the Constitution prevents their doing just that—although one should make haste to add that custom and the public temper have rigorously decreed a different method which no state legislature would now dare to change. Every state legislature has long since directed, in obedience to the popular demand, that the electors shall be chosen by the people. The Constitution

reads "appoint" but the state legislatures have made it read "elect." The great and solemn referendum which draws more than thirty million Americans to the polls every four years is thus a stipulation of the unwritten, not the written, Constitution of the United States.

Many other examples of a like character could be given. The democratization of the fundamental law has been going on steadily for over a hundred years. It has transformed the spirit, although it has not greatly changed the letter of the Constitution. So many great figures in American history have had a hand in the process that there would be endless difficulty in apportioning to each his proper share of the credit; but it will be generally conceded, I think, that among those who helped to give American government the democratic coloring which it now bears, Andrew Jackson stands easily first and is likely to hold his primacy to the end of time. Within a single decade he demonstrated that without changing a single letter of the Constitution the government of the United States could be brought under the control of the masses and made a popular government in fact as in form.

This Second American Revolution, which took place from 1828 to 1837, was in some of its political phases more significant than the First American Revolution which occurred during the years 1775-1783.

The earlier revolution did not shift the weight of political power from one class of people to the other. It was an economic, social and intellectual overturn of prime significance, but it did not break the political strength of the propertied classes. Men of wealth were dominant in all fields of government after the Revolution as before it. No one had the right to vote in the thirteen states after 1776 who did not have it in the thirteen colonies before 1776. The Declaration of Independence enumerates a long list of grievances, but nowhere in it do you find complaint that the suffrage had been withheld from anyone who ought to have enjoyed it. Jefferson might write of inherent human equality in the Declaration; but he made no heroic effort to put any definite provision for manhood suffrage among the laws of the land.

Most writers have made an unduly abrupt separation between two great epochs of American history, with 1776 as the dividing date. The Declaration gave the people a new political philosophy; but it did not give them a wholly new scheme of government. It altered the outer forms but not the inner realities. The shell was cast off; but the kernel was kept. In the history of American democracy one can put up a good argument for the proposition that 1828 is a more significant date than 1776.

For when King Andrew the First came to the

throne he found the federal government a virtual aristocracy of social position, education, and wealth. For forty years it had been controlled by the seaboard dynasty. Every President down to 1828 had come from Virginia or Massachusetts. One and all they had been drawn from the Brahmin caste of American society, from the wearers of broadcloth, not homespun. Even Thomas Jefferson, with all his philosophical liberalism, was a Virginian gentleman, an aristocrat by birth and affiliations. During these four decades, the presidency was never once permitted to pass outside the ranks of the trusted circle.

Nominations for the presidential office were settled during the first quarter of the nineteenth century by congressional caucuses made up for each party by its senators and representatives in Congress, although this practice was open to several serious objections. For one thing, it meant that a state which did not have any representatives of the party in Congress had no share in the selection of the party's candidate for the presidency. It was an arrogation by senators and representatives of a privilege which the Constitution did not confer upon them, and indeed one which the framers of the Constitution were especially desirous that they should not have. These congressional caucuses inevitably narrowed the choice of the people to the few national

figures whose faces were familiar in Washington; they paid no heed to the favorite sons who now began coming into prominence as governors of states. So long as the congressional caucus kept control of the nominations, there was little chance for anyone in the nine new states that had arisen beyond the Alleghenies.

Jackson realized that if the presidency was to become a truly elective office, with the whole people determining the choice, two steps were essential: First, the congressional caucus method of nominating presidential candidates must be broken down and the powers which had been usurped by the caucus must be vested in national conventions made up of delegates directly chosen for this purpose "fresh from the people," as he phrased it. In other words, there must be popular nomination before there could be popular election.

Second, it was Jackson's belief that there must be an extension of the suffrage. The state legislatures without exception had turned over to the voters the function of choosing the presidential electors; but who were the voters? The Constitution did not prescribe who should vote at presidential elections in case popular voting for electors should be permitted by the state legislatures. It left the federal suffrage to the individual states for decision. A few states had established manhood suffrage for white

persons during the interval since the Constitution was adopted, but in the majority of them, property or tax-paying qualifications for voting were still on the statute books. In some of the states the proportion of voters to population was as low as one in fifteen. Jackson, and the movement which he typified, set out to change the situation by pressing the cause of manhood suffrage. And in the end he was successful, although he met opposition from such leaders as Daniel Webster and Joseph Story in Massachusetts, Chancellor Kent in New York, and James Madison, John Marshall, and John Randolph in Virginia.

Who was this field marshal of the Second American Revolution—this crusader who set out "to make the American democracy democ" in ways that its founders had never intended it to do? Andrew Jackson was a son of the soil, a native of North Carolina, born in 1767. He studied law, removed to Tennessee, and there on the frontier became successively a land speculator, horse dealer, slave-owner and judge. But he had neither a legal nor a judicial mind; his flair was for politics and it soon led him to the hustings. After a hectic campaign he became the first representative in Congress from Tennessee when that state entered the Union. A little later he was chosen senator, but soon resigned. The activities of a legislator were not to his liking;

he lacked the patience and tact that were essential to success in either House or Senate.

Hence Jackson had attained no national prominence when the War of 1812 began. This struggle opened the door of opportunity. Entering the local militia Jackson pushed his way into leadership and executed a brilliant repulse of the British at New Orleans. In this operation it was the incompetence of his opponents rather than his own military skill that carried the day, but Jackson got the credit and he was entitled to it. He became, almost overnight, the best known American general of his time. After the close of the war with Great Britain he was sent to conduct operations against the Indians on the Florida border, and when Florida was acquired from Spain he became its first military governor. But after a few years he resigned from the army, resumed his place as senator from Tennessee, and became a candidate for the presidency in 1824, not by his own desire but at the instigation of his friends. Although he received a plurality of electoral votes at this election, he did not obtain the requisite majority, and when the decision was thrown into the House of Representatives he was defeated by John Quincy Adams of Massachusetts. Four years later, in 1828, he fought a straight fight with Adams and won handsomely.

Jackson, as his record shows, was a fighter by

instinct and temperament. His life was spent in waging war—on Indians, the British, the congressional caucus, the bureaucracy, nullification, the bank, the aristocratic spirit. As respects his personal attributes, he was the product of his military experience and his bucolic surroundings, a democrat with a small "d." He was of the common people and understood them. His decisions were quick, and although they seemed erratic they were altogether in accord with his own outlook upon the politics of his day. There was no suavity or spirit of compromise in his rather ungainly frame. He wore shabby clothes, chewed tobacco, and went about unshaved. He told stories that would have shocked Boccaccio. Take one of the new twenty-dollar bills out of your pocket, if you are lucky enough to have one, and you will see his portrait, somewhat idealized but with firmness written in every line of an iron countenance. His opponent in the election of 1828, John Quincy Adams, called him "that brawler from Tennessee" and not without reason, for Jackson was far from being the embodiment of gentility. He was neither studious nor teachable, and hence during his few terms at school never learned to use the English language correctly. His grammar was a law unto itself and his spelling likewise. Adjectives and adverbs he regarded as having been created free and equal. On the other hand, his thought was

clear, and his ideas clean-cut, hence his style was very effective in spite of its formal blemishes.

Jackson's inauguration set a record. Never before had Washington seen such a spectacle. The great unwashed came to the capital by the thousands, most of them looking for a prompt articulation with the public pay roll. They swarmed into the White House, where they drained the punch bowls and then stood with their cowhide boots upon the upholstered chairs to get a glimpse of their own Sir Galahad, the first frontier President, the first American chief executive who had made his hands horny by toil, and the first since Washington who was not a college graduate.

Yet Jackson, with all his outward crudeness, was probably the most widely idolized of all the Presidents between Washington and Lincoln, besides being the most bitterly hated by his opponents. The secret of his power, says Bassett, was his adjustment to the period in which he lived.[1] Greatness is a relative quality. Jackson could not have been a great President if he had lived immediately after a war, when the mind of the country was swinging like a pendulum to the Extreme Right. He was carried into office by a great surge of equalitarian sentiment; the greatest, perhaps, that the country has ever known. And he was a perfect reflection

[1] *Life of Andrew Jackson* (2 vols., Garden City, 1911).

of it, for Jackson accepted democracy in all its implications, even in its extreme implications. He was the very antithesis of Hamilton and Marshall, being possessed of an abounding faith in the political sagacity of the crowd. In the French Revolution he would have been a Jacobin and doubtless would have sent both Clay and Calhoun to the guillotine. Yet in some things Jackson showed unexpected moderation and refused to go the lengths that his advisers desired.

Historians, until recently, have not been fair to Jackson. They have been inclined to look upon his eight years in the White House as a tremulous interlude which had little relation to what went before and even less to what came after. The President, wrote Clay, "has swept over the government during the last eight years like a tropical tornado." But Jackson was no freak of nature. He was neither typhoon, nor tornado, nor wild ass of the desert. He was the incarnation of forces in American politics that had come to stay. He knew what he wanted; he had a policy; it was clearly set forth in his First Inaugural; he held to it without waver; and before the end of his second term he had carried much of it into operation. Furthermore, most of Jackson's achievements have endured; they have become part and parcel of both national and state government as we have them to-day.

More specifically, there are four contributions to the unwritten constitution that Jackson had a large share in making. First, he changed the methods whereby presidential nominations had previously been determined and thereby laid the basis for our present system of national party conventions. Second, he and the movement which he represented were influential factors in the widening of the suffrage, both before and after his accession to the presidency. Third, he greatly extended, although he did not inaugurate, the spoils system which still hovers like a vulture above the arena of American politics, although its wings have been clipped by the civil service laws. Finally, he gave nation-wide vogue to the doctrine of rotation in office, a principle which has lost much of its vigor during the past hundred years but still retains some of its old-time grip on the national consciousness.

Let us briefly review these four Jacksonian contributions. The framers of the Constitution, as has been said, made no provision for the formal nomination of presidential candidates. For it was their idea that there would be no nominations, and no candidates in the usual sense. The office, through the presidential electors, would seek the man. In other words these electors, each in their respective states, would seek, find, nominate and elect—all at one and the same time. Human ambition being

what it was, this plan could not do otherwise than fail. If left to themselves, without central guidance or direction, the electors would inevitably vote for candidates from their own or from near-by states and no one would secure a majority, in which case Congress would do the electing. "There are subjects to which the capacities of the bulk of mankind are unequal," said Madison in 1788, "and on which they must and will be governed by those with whom they happen to have acquaintance." Central guidance for the presidential electors, in other words some form of national nominating machinery, was bound to be provided sooner or later.

The framers of the Constitution made the further mistake of stipulating that no senator or representative in Congress could serve as a presidential elector. It was a mistake because these members of Congress, the chosen representatives of the people, could not possibly be kept by fiat of law from interesting themselves in the choice of a chief executive. They, indeed, were the only ones who possessed a sufficient acquaintance with the public men of the whole country to enable them to function as presidential electors in the way that the Constitution contemplated. Debarred from serving as presidential electors, they were bound to usurp, if they could, the function of nominating the candidates, thus taking away from the electors the major portion of

their discretion. Thus the congressional caucus was not an accidental development. It was the most logical device for focussing public opinion and ensuring a majority choice at a presidential election. Without it the plan of choosing the nation's chief executive, as prescribed in the Constitution, would have broken down during the first quarter-century of its operation.

But the congressional caucus outlived the conditions which called it into existence. National issues and national personages duly arose above and beyond the welter of local controversies. People everywhere came to think nationally, to familiarize themselves with the antecedents and character of American statesmen in regions other than their own. There was no longer need for guidance, much less for dictation, at the hands of a caucus in Washington. So Jackson set out to break the caucus system down, supplanting it by a makeshift plan under which the various state legislatures would suggest names to the presidential electors for their consideration. He himself had been nominated in 1824 by the legislature of Tennessee, and other state legislatures had endorsed his nomination.

This plan of nomination by state legislatures, however, proved to be almost equally objectionable. It served as a protest, but not as a policy, and quickly gave way to the national party convention

substantially as we have it to-day. Such a convention nominated Jackson for his second term in 1832, and by the close of his administration the system of nomination by national conventions was tacitly accepted by both the major parties. The methods of choosing delegates to the national party conventions have been somewhat altered from time to time, and various new usages have been developed since Jackson's day, but the general outlines have remained unchanged. And the national party convention has now become a fixture of the American governmental system—as firmly anchored as though it were in the Constitution itself. With its high-noting and key-noting, its dark horses and favorite sons, its ballotings and ballyhoo, this national party convention is perhaps the most characteristically American of all America's contributions to the art of governing a free people. It is our most vivid reminder of what the term "Jacksonian democracy" impressed and implied.

During the past hundred years we have had three widely-marketed brands of American democracy—Jeffersonian, Jacksonian, and Wilsonian. Wherein did they differ from each other? To Jefferson, democracy involved keeping the activities of government within narrow limits. But Jackson had no fear that government would undertake too much, nor had Wilson. Jefferson was a philosophic lib-

eral, firm in his allegiance to phrases, as Wilson also was. Jackson, by way of contrast with both, did not coin phrases or propound theories, but acted in response to an unerring democratic intuition and let the theories look out for themselves. Jeffersonian democracy displayed a tender solicitude for state rights, while the Jacksonian brand showed next to none, as South Carolina discovered. And if Wilsonian democracy had much of this solicitude, even as much as Rooseveltian Republicanism, there was no disclosure of it—in the National Defence Act, for example.

In the case of Jefferson and Wilson their support came from the masses, but their personal tastes were with the intelligentsia. Jackson's tastes were where his votes came from. He lifted up his eyes unto the hills from whence came his aid. All three,—Jefferson, Jackson, and Wilson—stressed the plain man's rights and opportunities; but to Jefferson they were hopes, to Wilson principles, and to Jackson realities. All three, again, were militant foes of centralized money power. Jefferson fought against the first United States Bank; Jackson extinguished the second; and Wilson made sure there would never be a third by regionalizing the Federal Reserve System. Jefferson and Wilson were scholars in politics, while Jackson had no bent for erudition in any of its forms. Hence, while Jeffersonian democ-

racy was argumentative, and Wilsonian rhetorical, Jacksonian was vociferous.

Democracy has everywhere become associated with universal suffrage in our day; but there was no such association in America prior to Jackson's time. Restrictions upon the right to vote continued in nearly all the states until the nineteenth century was well under way. In some the requirement was that a voter should own at least fifty acres of land or an equivalent amount of property in some tangible form. In others the suffrage was confined to taxpayers. Vermont, which entered the Union in 1791, was the first state to establish full manhood suffrage, but Kentucky followed a year later. As other new states were admitted along the frontier, they adopted liberal suffrage provisions but did not go to full manhood suffrage in all cases. The anti-suffragists of those days waged a bitter struggle against this "vulgarization of politics" as it was called; but they were fighting a lost cause, as anti-suffragists have done in all ages. Before the onset of the new liberalism, which advanced in echelon across the country, one state after another relaxed its requirements for voting. New York and Virginia capitulated in 1830. At the close of Jackson's second term, manhood suffrage had been adopted by all the states but three. Daniel Webster argued that equality of suffrage was incompatible with true

republicanism and at variance with the spirit of the Constitution—but in vain. The control of government passed from the Patricians to the Plebæans, thus accomplishing a Second American Revolution which was in some ways more of an earthquake in politics than the first had been.

Even with manhood suffrage, however, the electorate was a relatively small body. The population of the United States in 1828 was about twelve and a half millions, but the total vote polled at the presidential election of that year was less than 1,250,000, or only ten per cent of the population. At the election of 1928, a hundred years later, the total polled vote was nearly thirty per cent of the population. More votes were cast for Alfred E. Smith in New York City alone than were secured by Andrew Jackson in the entire twenty-eight states of the Union a century ago. The extension of the American suffrage during the past century has increased the proportion of voters to population by over three hundred per cent.

Turn to the third of Andrew Jackson's contributions, or, more accurately, to the third political innovation with which Jacksonian democracy is commonly associated, namely the spoils system. It is often said that Jackson originated this sinister feature of American politics, but such was by no means the case. The almost universal impression that

Jackson invented the idea of dividing the spoils of victory among his followers is merely an illustration of the persistent human desire to find a simple explanation instead of a complicated one for all new political developments.

The spoils system far antedated Jackson's day. It prevailed in the provinces of the Roman Empire, and in the dukedoms of feudal Europe. Doubtless it began with human nature, for ever since man was first condemned to earn bread by the sweat of his brow he has been endeavoring to get the most bread for the least sweat. To that end he has sought in all ages to live off the bounty of kings and parliaments. Sir Robert Walpole, prime minister of England, exemplified the spoils system on a large scale long before Jackson was born. He filled the government service, and even the House of Commons, with placemen and pensioners.

In the American colonies, moreover, political patronage was used to support the policy of the crown, despite protests on the part of the colonial assemblies. Removals from office and partisan appointments were by no means uncommon in the federal and state governments after the Revolution. Some were made by every administration prior to 1828. Jackson and his friends merely called the spoils system by its right name, elevated it to the dignity of a national principle, avowed their allegi-

ance to it openly, and extended it to all branches of the administration where the Constitution did not stand in the way.

The spoils system was in harmony with the general principles of Jacksonian democracy. Jackson believed in the common man and in the party system. He placed no value upon expertness or experience in the public service. Every office in the government, even the very highest, was regarded by him as within the reasonable expectations of the plain citizen, whatever his education or background. "The road to office and preferment," he wrote, "being accessible alike to the rich and the poor, the farmer and pioneer, honesty, probity, and capacity constituting the sole and exclusive test, will, I am persuaded, have the happiest tendency to preserve unimpaired freedom of political action." [1]

Not only that, but inasmuch as Jackson believed in the party system and realized that parties must have nourishment, he found in the spoils system a channel through which party service could be rewarded, party ambitions inspired, and party organizations strengthened. Moreover, he believed that many federal offices were occupied by men who felt themselves sure of a life tenure and acted accordingly, with no real sense of their obligations to the

[1] J. S. Bassett, *Life of Andrew Jackson* (2 vols., Garden City, 1911), p. 451.

public. It was Jackson's idea that office-holders could only be held to a strict accountability when they felt themselves liable to be replaced at any time. Hence he intimated during his pre-election campaign that there would be drastic changes in the administrative personnel. People expected a clean sweep when he went to the White House, but the removals were by no means so numerous as was anticipated. The total number of them during the first year of the new administration has been estimated at about seven hundred. This probably left a majority of the old officials undisturbed. Jackson did not make all the vacancies that his hungry followers pressed him to make.

It is often said by civil service reformers that the spoils system was born in sordidness, grew up in corruption, and died unhonored—with never a word to be said in its favor from first to last. That is hard to believe, in view of the system's longevity. Institutions and methods that have no color of justification quickly pass out of existence and are forgotten, for the law of natural selection works among political as among biological organisms. Whether one sees any scintilla of merit in the spoils system depends on the point of view. The strong partisan, who sets party before commonwealth, can put up a valiant defence for the system, and it was by strong partisans that the country found itself governed

during the mid-decades of the nineteenth century. Only with the relaxing of this aggressive party spirit did the spoils system slacken its hold on public opinion and begin to give way. It has continued to lose ground during the years since the first national civil service law was enacted in 1883.

But let no one delude himself into a conviction that patronage in politics is now a thing of the past, or that civil service reform has forced the spoilsmen to an unconditional surrender. Offices are still bestowed as patronage in half the states and two-thirds of the cities, taking the country as a whole. And there are millions of Americans who still believe, as Jackson did, that a prime duty of a new administration is to take care of its friends. That belief has wrought unmeasurable damage through the adulteration of the public service and the lowering of political standards in the national, state and local governments of America; but it is even yet far from the point of eradication in the popular psychology.

Along with the spoils system in Jackson's political creed, and closely connected with it, was the principle of rotation in office. Here, again, Jackson was not an originator. In the bills of rights which were incorporated into the early state constitutions the idea of rotation was frequently enunciated. Jefferson had gone on record in its favor as a principle,

and Jackson merely went a step further by putting it into operation. And why not? If all American citizens were created free and equal, and hence equally capable of governing one another, there was no reason why every one should not have his turn at governing. The traditional reason for leaving a man in office year after year is that he may master its duties and become efficient by experience. But Jackson had no sympathy with that point of view. On the contrary, he believed that long terms impaired rather than promoted efficiency in the public service. "Every man who has been in office a few years," he wrote, "believes he has a life estate in it, a vested right, and if it has been held twenty years or upwards, not only a vested right but that it ought to descend to his children. This is not the principle of our government. It is rotation in office that will perpetuate our liberty."

That doctrine has never found support in the annals of free government anywhere, but it was widely accepted in Jackson's time. It naturally appealed to the public imagination in days when the masses of the people were making war on special privilege in all its forms. Hence this idea of rotation in office, as a bulwark of liberty, spread from the nation to the states and from the states to the cities. It forced itself into federal statutes, state constitutions and city charters. During the past fifty years

there has been a slow and steady drift away from rotation, and toward permanence of tenure; but in the case of elective positions there is still a general popular inclination to look upon the lengthening of official terms as undemocratic and un-American in that it tends to make government unresponsive and irresponsible.

What has been said of Jackson in these pages is related only to his work as a maker of the unwritten constitution, and more particularly as one who injected into it a homeopathic infusion of democracy as he understood the term. As the nation's chief executive, however, his name is associated with other and even more picturesque achievements—his assault on nullification, his war on the bank, and his policy with respect to internal improvements. The issue of nullification, although temporarily thrust into the background by Jackson's courage and promptness, reappeared in more acute form a generation later. The friends of a national banking system, although overcome by Jackson in 1836, had their revenge in 1863, and doubly so in 1913. And as for internal improvements, even Jackson's own party is now committed to the policy of subsidizing them from the national treasury by grants-in-aid to the states.

Most of what Jackson found himself able to do in these three fields of effort was fated to be undone. But the contributions of the Jacksonian movement

to the democratization of American government—through the plan of presidential nominations by national party conventions, the extension of the suffrage, the spoils system, and the principle of rotation in office—these have had a far longer lease of life. It is abundantly due to the memory of this rugged frontiersman to concede that he left the national government more democratic, more popular, and more truly American than he found it.

The old frontier which gave Jackson to the nation has passed away. It was geographical; it lay in the West.

> Far in the West, a paltry spot of land,
> That no man envied, and that no man owned,
> A woody hill beside a dismal bog—
> This was your choice; nor were you much to blame;
> And here, responsive to the croaking frog,
> You grubbed, and stubbed,
> And feared no landlord's claim.'

These people who grubbed and stubbed were almost one hundred per cent American, having been transplanted from the seaboard states of the East. Hence the Jacksonian frontier did not differ from the older areas in race or religion, but only in social and political ideas.

To-day we have a new frontier, although most people do not realize it. This new frontier of twentieth-century America is not geographical, as

the old one was. It is racial largely, and economic in part. Dividing the newer stock from the native, it does not cut vertically, through valleys and plains, but horizontally, through the social strata of the population. This American frontier of to-day—the boundary along which the task of national absorption and integration is proceeding—lies in our industrial cities and towns. It is there, on the East Side, or in the North End, or wherever the immigrants and sons of immigrants are gathered together.

Out of this frontier, exactly a hundred years after Jackson's first triumph, the party which he led to victory in 1828 chose its standard bearer. It was hoped by the more ardent partisans of Alfred E. Smith that his election to the presidency would once again bring control of the nation's government beneath the sway of "the common man of the Newer America." This hope, a forlorn one from the outset, did not achieve the miracle of fulfillment. But it would be folly to blink the fact that great sections of the American electorate still cherish it, and though defeated are not cast down. The new frontier may yet transform the spirit of the laws, as the old one did.

IV

Woodrow Wilson and the Accentuation of Presidential Leadership

IV

Woodrow Wilson and the Accentuation of Presidential Leadership

THE weakest spot in the American political system is its failure to place sufficient emphasis on leadership. The keynote of the Constitution, as it was framed in 1787, is safety, not initiative. The Fathers of the Republic sought balance, not momentum. They set out to create a government that would be automatically protected against the concentration of too much power anywhere. It was natural that they should have done this, for they had right before their eyes the example of an all-powerful king in France and a nearly all-powerful Parliament in England. They were determined that no man, and no body of men, should ever be able to say *L'Etat c'est moi* in the United States.

They had also, and even more vividly in mind, the experience of the American colonies. During the years immediately preceding the Revolution the colonial governors had often assumed an excess of authority. They had defied the respresentatives of the people in the colonial assemblies. They had arrogated to themselves the function of leadership

and used it in wrong directions. As a result of this, and by reason of the resentment against it, the new state constitutions reduced the powers of the governors to a minimum. The earliest state governors, as Madison said, were mere ciphers, while the new state legislatures stood out everywhere as the dominating factors in government. Leadership, in a word, was an unpopular term in these critical days. It was looked upon as a synonym for personal autocracy. It was an attribute of "low ambition and the pride of kings."

It was in this atmosphere, surcharged with an animus against personal power in all its forms, that the delegates to the Philadelphia Convention did their work. They had thirteen brand-new state constitutions before them, and from these constitutions they inevitably drew a great deal both in words and in spirit; yet they were not prepared to go the whole distance in reducing the federal executive to a subordinate place in their new scheme of government. They were not prepared to do this because they believed, with Madison, that legislative tyranny was as much to be feared as executive despotism. They were not minded to set up, in the United States, a federal legislature that would become a new-world mirage of the Houses at Westminster.

"Give all the power to the many," said Hamilton, "and they will oppress the few. Give all the power

to the few and they will oppress the many. Both ought, therefore, to have power so that each may defend itself against the other." Here, then, was their problem: to make the President and Congress coördinate in authority, independent of each other, mutually serving as a counterpoise and hence incapable of imitating either Bourbon king or British Parliament in point of governmental voracity. "An elective despotism," wrote Jefferson, "was not what we fought for . . . but one in which the powers of government should be so divided and balanced . . . that no one could transcend the legal limits without being effectually checked and restrained by the others."

In other words the Constitution was fabricated by men who believed that the laws of Newtonian physics could be applied to the construction of a government. They accepted, as a first principle, the law of gravitation in politics—the inexorable gravitation of power away from small centers of authority by the attraction of larger ones. So they designed the government as though it were a ship for use in rough waters, with sails for momentum, and ballast for stability, and a rudder for direction, —all adjusted to one another.

Therein they erred. The natural kinship of government is not with a mechanism but with a living organism. It is a thing of growing cells, not of

hulks and helms, or of bolts and balance wheels. It is a Darwinian, not a Newtonian proposition, as Woodrow Wilson once remarked. It must inevitably be modified by its environment and shaped to new functions by the sheer pressure of life, for no living creature can have its organs offset against each other and live.[1] The Supreme Court has recognized all this. It has tried to loosen the rigidity of the checks which the founders of the Republic imposed.

Now whatever else may be said about this axiom that "power should be an automatic equipoise to power," there can be no doubt that it has made unified political leadership difficult at all times, and sometimes impossible. A government based on division of powers is bound to encourage multiple, not unified, leadership. It brings forth executive leaders, legislative leaders, party leaders—even the judiciary helps to supply leaders through the political aspirations of elective judges and district attorneys. The American scheme of government fosters the production of leaders who dominate portions of the political field, not the whole of it. Only on rare occasions do we secure, either in the nation or in the states, a leader whose supremacy is as complete as is that of the prime minister under a parliamentary system of government.

[1] *The New Freedom* (New York, 1913), pp. 45-47.

In a way this is unfortunate, for leadership is the essence of achievement in a democracy. No free government can function efficiently without it. It must be responsible leadership, moreover, for leadership without responsibility is bossism. The chief reason why we have had so many bosses in American states and cities is that their governments often make no provision for what is the only alternative to bossism. The public mind is not a self-starting apparatus. Some one must provide the initial momentum. If there is no provision for leaders to do it, some one else will usurp the function.

At any rate the framers of the American Constitution were true to their mechanistic conception. When they gave power with the right hand they took it away with the left. Hence, if you study the Constitution carefully, you will find that all the more important powers committed to the President were given with limitations tacked on to them. It is only the relatively unimportant presidential powers that are bestowed upon him without limitation, to exercise as he may see fit. Among these latter, for instance, is the right to call Congress in special session, to send it information on the state of the Union, to require in writing the opinions of his department heads—all of which are powers that contain little or no possibility of abuse or extension. But the outstanding powers of the President—his

right to veto bills, his power of appointment, and his treaty-making authority—these are all conferred on him by the Constitution in heavily restricted form.

The President is empowered to appoint diplomatic and consular officials, judges of the Supreme Court, heads of departments, and other officers of the United States; but with the important limitation that all such appointments must be confirmed by the Senate before they become valid. The emphasis which the framers of the Constitution placed upon this senatorial confirmation is shown by the scrupulous care with which they stipulated that no recess appointments would be valid beyond the end of the Senate's next session. They did not intend that any President should have opportunity to build up a court party or faction such as had dominated the English government in colonial days.

It was apparently in their minds that the consent of the Senate would be needed for removals also; but they did not make this stipulation in express terms. Removals from office were rare in those days; most appointive officials held their posts for life; it did not occur to any one that short terms, the spoils system, and rotation in office would some day give rise to a nation-wide controversy over the power to remove as did in Jackson's first administration, and again in the struggle which preceded

the impeachment of President Johnson. In due course, however, the President assumed the right to remove without the Senate's concurrence, and this power is now an accepted provision of the unwritten constitution. It has been definitely upheld by a recent decision of the Supreme Court.[1]

Again the President is expressly given power to negotiate treaties, but with the limitation that two-thirds of the senators present must concur before a treaty becomes valid. This is one limitation which has proved even more stringent than the framers of the Constitution foresaw. To conclude a valid treaty, with the United States as a party to it, now requires as a maximum the assent of sixty-five persons, namely the President, and sixty-four senators if all are present. Thirty-two senators can prevent ratification at any time and under all circumstances, and as a rule a smaller number can do it by means of a filibuster. No other great country requires a two-thirds vote of a legislative body for treaty ratification. Why is it required in the United States?

The answer is that no one, in the Constitutional Convention of 1787, had the faintest idea that we would ever have a Senate of ninety-six members. The Constitution was to go into effect if nine states approved, and there were serious doubts that even nine would come into the new Union. But if nine

[1] Myers *vs.* U. S. (1924).

accepted the Constitution there would be eighteen senators in all. Judging from past experience, and in view of the difficulties connected with eighteenth-century travel there would always be a considerable sprinkling of absentees. That being the case, it was quite conceivable that if only a majority of the senators present were required to approve a treaty, the thing could be accomplished by the votes of six or seven men. Three or four states, with the aid of the President, might put through a treaty of alliance and thus draw the country into "the ordinary collisions of Europe's friendships and enmities." To guard against that danger the Founding Fathers inserted the two-thirds clause which to-day makes it so difficult to procure senatorial ratification for a treaty of any sort.

How severely this provision ties the President's hands we can see at the present hour. Fundamentally, the control of American foreign relations is vested in one-third of the membership in one-half of Congress. Definite, forceful, responsible leadership is in no branch of government more essential than in the field of diplomacy and foreign affairs. All other countries have it and how we get along without it in the United States is something that the rest of the world has given up trying to understand. John Hay once predicted that no important treaty would ever again pass the Senate without mutilation,

thus disclosing an exaggerated pessimism; yet it has become transparently obvious that every treaty goes into the Senate with the chances two to one against it, no matter what its merits, and that in many cases the likelihood of its being carried out in an ambulance justifies a wager of even three or four to one. Strength, promptness, and decision in the exercise of the treaty-making power are thus replaced by weakness, equivocation and delay. Would it not provide the nation with an adequate safeguard, while conducing to the effectiveness of presidential leadership in foreign relations if a constitutional amendment could be adopted to provide for the ratification of treaties by a simple majority in both Houses of Congress?

Such an arrangement would have logic on its side, for a treaty ranks as a law of the land. It has the force of a statute. Hence its provisions can be repealed at any time by statute or by resolution, that is, by the action of a mere majority in both Houses with the President's assent.[1] When a treaty and a federal law are in conflict, the one that is

[1] Such action, of course, does not affect the international obligation of a treaty, but only its status in the United States. The Supreme Court of the United States has held that since treaties and federal laws are placed by the Constitution on the same plane, "no paramount authority is given to one over the other. . . . In either case the last expression of the sovereign will must control." Chinese Exclusion Case, 130 *U. S.*, 581.

later in point of time prevails. Is there not an inconsistency in having treaties ratified in one way, and laws in another, when both have the same status and sanction in the eyes of the courts?

The third outstanding power of the President, as conferred by the Constitution, is his veto power. This was given to him as a weapon of defence. Hamilton called it "a shield to the executive." There was an expectation, however, that the presidential veto would be rarely used, and during the first forty years of the Republic this expectation was fulfilled. The first five presidents vetoed only nine bills in all. In nearly every case, moreover, the veto was based upon some organic objection to the measure, and not upon presidential views as to its expediency.[1] In other words, neither the framers of the Constitution, nor the Presidents of the constitutional group had in mind the free use of the veto power which developed in later years. It was not their idea that the chief executive should constitute himself a third House of Congress.

But that is virtually what has come to pass. During the last hundred years there has developed the doctrine that the President is free to use his veto power for any reason whatsoever, or even without any reason at all. Since the Civil War presidential vetoes on constitutional or organic grounds have

[1] See E. C. Mason, *The Veto Power* (Boston, 1890), p. 130.

become rare. The vast majority of vetoes have been based upon the President's own opinions as to the unwisdom of measures submitted to him. This unquestionably marks a great extension of executive powers beyond what a majority among the framers of the Constitution intended. James Wilson was willing that the President's veto should be absolute, because "he believed, as others did, that it would seldom be used" in any case. Just a century later Grover Cleveland showed how far this delegate from Pennsylvania was wide of the mark by vetoing more than three hundred bills in a single administration!

In general, then, the three outstanding powers of the nation's chief executive were given in a strictly limited form. The predominance of authority was intended to be lodged with Congress. But if the framers of the Constitution expected it to remain there, if they counted upon Congress to be the dominant factor in the directing of public policy, they made one serious omission. They provided Congress with no channel into which its power could be concentrated and made conclusive. They provided it with no prime minister or other authoritative leader who could prefigure the will and power of Congress to the public imagination. They did not sense the fact that the English House of Commons had become powerful through the agency of

the Walpoles and Pitts who had altogether supplanted the Speaker as the official voice of the burgesses and knights of the shire at Westminster.

It was apparently their expectation that both Houses of Congress would lead themselves. In the Senate, which was a relatively small body during the early years of the Republic, this lack of a unified command was not seriously felt; but in the House it soon became a grave shortcoming, and with the continued growth of this chamber it became an insuperable barrier to legislative efficiency. No legislative body of several hundred members can do effective work without guidance and direction from some recognized source. Under the parliamentary system of government, as it exists in European countries, the leadership in legislation is supplied by members of the Cabinet who have seats in the national legislative body; but in the United States members of the Cabinet are not vested with this right.

Quite naturally, therefore, the function of leadership in the national House of Representatives was gradually usurped by the Speaker—not because he was particularly qualified to perform this duty, but because he was the only outstanding officer chosen by the House itself. The Speaker became the man on whom the majority depended for getting legislation through. He became, in a way, the American

prime minister, so far as the rulership of the House was concerned. At the close of the nineteenth century it could fairly be said that the Speaker of the House sometimes exercised, in relation to the passage of laws and the making of appropriations, an even greater influence than that of the President himself.

But this arrogation of legislative leadership by the Speaker was not destined to endure. In 1910-1911 came the Grand Remonstrance, the revolt of the agrarian Republicans in the House. Combining with the Democrats they stripped the Speakership of its autocratic powers. This was regarded as a great victory for the cause of responsive government, and there were those who imagined that it would assure the independence of the House. But it did nothing of the kind. A legislative chamber of 435 members must find leadership, somehow, somewhere. If it is not provided by the Constitution, or the laws, or by the rules of the House, usage will step in and fill the gap. By insisting that the Speaker should not lead the House, while providing no other internal leadership, the insurgents of 1910-1911 opened the door to leadership from without. In other words the revolt against the authority of the Speaker, whom the House could control, merely paved the way for domination by the President whom it could not control.

The final overthrow of the Speaker's supremacy came in 1911. Woodrow Wilson was inaugurated President in 1913, and he lost no time in taking advantage of the new situation. Naturally so, for it precisely fitted his own conception of the presidential function. He believed that a President of the United States ought to perform the duties of a prime minister by assuming the initiative in legislation; he ought to lead Congress and by his leadership make the legislative process efficient. True enough, as President Wilson realized, the Constitution gave no such function to the chief executive. But had not the growth of the party system changed the whole situation? Had it not forced into the unwritten constitution of the United States a stipulation that every President shall go into office pledged to the hilt by his party platform, by his speech of acceptance, and by personal promises of legislative achievement which the country expects him to redeem? And how can a President fulfill these pledges unless he breaks the constitutional equilibrium and avowedly becomes a leader in lawmaking? For leadership is three-fourths initiative, courage, aggressiveness—only one-fourth caution and political sagacity.

This "prime minister" theory of the presidential office was not a new one with Mr. Wilson. He did not make its acquaintance after his plunge into prac-

tical politics. On the contrary he had expounded it in print many years before he became an aspirant for public office. Back in the unctious eighties, when he was a college instructor, Thomas Woodrow Wilson, Ph.D., had published a book on *Congressional Government* in which he vigorously declared his belief that the American system of national government would never function properly until the practice of executive leadership was imposed upon it. "We have in this country," he wrote, "no real leadership, because no man is allowed to direct the course of Congress, and there is no way of governing the country except through Congress." [1] Thirty years had to pass before the author of this sentence got an opportunity to act upon its implications; but when the chance arrived he gave the country an amazing exemplification of how a President might "direct the course of Congress" and thereby find a way of "governing the country."

A president with personal qualifications inferior to those of Mr. Wilson would probably have failed in any attempt to vitalize a principle so widely thought to be at variance with the hallowed doctrine of checks and balances. Or, even with the qualifications, the attempt would probably have proved a failure at any other juncture in American political history. President Wilson was fortunate in finding

[1] *Congressional Government,* p. 205.

himself endowed with the qualities and faced by the occasion. For although he was neither the deliberate choice of the American people at the election of 1912, nor the outstanding personage in his party, he was a man of quite extraordinary intellectual caliber; he was excelled by no living American in his thorough knowledge of the science of politics (having made it a life study); he had clear ideas concerning the legislation that he desired; he could appeal to the party allegiance of a Democratic majority in both Houses of Congress; and to his great advantage he found the old leadership overthrown in the House of Representatives with nothing yet set up in its place. Here was a concatenation of personal qualities and political circumstances which had never happened before and may never occur again. Mr. Wilson saw it, seized the opportunity, and used it to the full—without reluctance or apology.

When Woodrow Wilson was inaugurated in 1913 the Democratic party had been wandering in the wilderness for sixteen years. Its hungry cohorts had been refreshed during this interval by very little manna from on high. Now it was swept into power—but not because the country had rallied to a constructive Democratic program but merely because half the Republican party had obeyed the summons to "stand at Armageddon." There were

high hopes that patience would now be rewarded, especially in the way of an old-fashioned Jacksonian gerrymandering of the public pay roll.

But Wilson was not much interested in the patronage. His eyes were directed toward the east end of Pennsylvania Avenue, where he did not propose to let Congress raise issues and get entangled in them, as McKinley and Taft had done. Six years before he entered the White House, Mr. Wilson gave a lecture in which he delivered himself of the opinion that "The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the Constitution." [1]

Woodrow Wilson, of course, was not the first occupant of the White House who tried to be as big a man as he could, and to overbear Congress with an iron hand. Grover Cleveland had attempted the task, but although he had the force and courage, the time was not ripe for his adventure. Theodore Roosevelt also tried it, and on more than one occasion called upon the country to support the President in bending Congress to his will. But Roosevelt's leadership of public opinion in the country was much more successful than his leadership of Congress. He was repeatedly forced to compromise or to give

[1] *Constitutional Government in the United States*, p. 70.

way. Woodrow Wilson was the first chief executive since Jackson's time who did not have to dicker with Congress on any important measure. His mastery at the Capitol stood for six years unchallenged. Literally he sent down his instructions and the bills came back for his signature, almost as the echoings of his voice. A leader leads, and a boss drives. Wilson did both.

Helpful or hurtful as we may choose to look upon it, the President's action in taking unto himself both the initiative and final decision in lawmaking was productive of striking results on the statute book. During the first six of his eight years he asked a great deal from Congress and obtained practically all of it. The legislative record of these six years is quite without parallel in any similar period of American history. Nearly all the "progressive measures" that had been under discussion for years, but which neither party had been able to enact, were now put through in drum-fire fashion. Wilson's record was as positive in results as that of the Taft administration had been negative. And every item in it secured him a new group of unforgiving enemies. The business men of the country instinctively disliked his academic type of mind; the politicians even more instinctively resented his domineering ways. He gained his ends because he had the power; but no other President since Jackson's time

left such a trail of bruised and bitter feelings behind him.

Consider the legislative achievements of the period 1913-1917, the four years preceding America's entry into the World War. A complete revision of the tariff was put through Congress at a single session. For the first time in more than a generation a tariff measure came out of Congress bearing some resemblance to what it was when it went in. The lobby of the special interests, which had manipulated the tariff schedules on previous occasions, found itself powerless in the face of the President's firm insistence. On the heels of the new tariff measure, and indeed as a part of it, the Income Tax Law of 1913 was enacted. The Clayton Act and the establishment of the Federal Trade Commission may also be looked upon as outstanding landmarks of these first Wilsonian years. In all probability the full import of this legislation has not yet been realized, for the Federal Trade Commission during the past ten years has been working in an atmosphere of doubtful executive friendliness. Some day, it is possible, this body may rival the Interstate Commerce Commission in the scope and importance of its powers. Recall, likewise, the LaFolette Seaman's Act of 1914, the Jones Act for the government of the Philippines, and the Adamson Law of 1916.

There is no intent to imply that these various measures were all of them well conceived or in the public interest. Their merit, or lack of it, is not under discussion here and now. My only point is that rarely if ever has so varied and important a program of legislation been pushed through Congress in so short a space of time. An even more remarkable feat it seems to be when one remembers that Congress, as a body, had no enthusiasm for any of these measures. They would not have been framed and enacted by either the Senate or the House of its own volition. Some of them were not statutes but "executive orders" in everything but name—for example, the Adamson Law, which related to the hours of work on railroads, and was largely dictated by the President's desire to capture the labor vote in his approaching campaign for reëlection.

Far outmatching in significance all the other statutory milestones of the first Wilson administration, however, is the Federal Reserve Act. This enactment may fairly be set down as the most important, the most constructive, and the most successful piece of financial legislation enacted by Congress during the entire era since the Civil War. The country has now had sixteen years' experience with the Federal Reserve System, and although all its possibilities have not yet been put to the test, we have seen

enough to realize that this elaboration of the national banking system has completely transformed the whole structure of American credit. It has given flexibility to what had been unduly rigid; it has adjusted volume of credit to volume of trade, and has provided a workable mechanism by which inflation and deflation can be in some measure controlled. We even hear predictions that with the Federal Reserve System in operation there can never again be such disastrous monetary crises as the country passed through with great damage to its industrial organization in 1873 and in 1893. Such predictions would seem to be not altogether warranted by the brief span of life that the Federal Reserve System has thus far enjoyed; yet it is probably safe to say that commercial depressions due to contractions of credit will probably not be so frequent, and perhaps not so severe, in the future as they have been in the past.

At any rate the establishment of the Federal Reserve System has given us some assurance against sudden, unexpected, or inscrutable collapses of industrial prosperity. For it provides a means by which a rapid fall in prices can be checked and too drastic a deflation of credit avoided. Warnings can be broadcast; storm signals hoisted, and industrial life-saving apparatus mobilized in time. Whether warnings will be heeded is another question. In any case

the potential value of this Wilsonian legislation can hardly be overestimated. It has given American business a sense of security and confidence. The program of war-financing which was carried through with such conspicuous success during the years 1917-1919 would have been impossible, or next to impossible, without this mechanism of orderly inflation.

To drive such a momentual piece of financial legislation through both Houses at Washington was no easy task. Probably it could not have been accomplished by any other President of our generation. During the Taft administration the need of greater elasticity in the credit system had been realized by every one, by the financial interests of the country and by the leaders of Congress alike. A plan for the establishment of a great central reserve bank was prepared, chiefly under the sponsorship of Senator Aldrich, who had already succeeded in obtaining from Congress a measure slightly alleviating the rigidity of credit; but the Aldrich Plan never had much chance of adoption for two reasons: first, because of the traditional popular antagonism to centralized banking, and, second, because Senator Aldrich was himself distrusted by both Democrats and Progressive Republicans as an ally of big business and a spokesman of the money power.[1] It

[1] The Aldrich Monetary Commission was established by Congress after the financial stringency of 1907. It made a thorough study

was inevitable, moreover, that a central reserve bank would be located in New York City and the rest of the country was strongly averse to any further growth in the financial power of the metropolis. As a matter of economics there was, and still is, much to be said for a great central bank, such as exists in England, France, and Germany; but as a matter of politics, there was, and still is, everything to be said against it in the United States.

The Wilson administration appreciated the existence of this political barrier and proceeded to surmount it by regionalizing the reserve bank idea, that is, by suggesting the establishment of twelve federal reserve banks instead of one, but with a general oversight to be exercised by a federal reserve board in Washington. This plan was vigorously urged by President Wilson in an address to Congress in June, 1913, and was embodied in the Federal Reserve Act which went to him for his signature in December of the same year. By its provisions each great section of the country got a bank of its own, and these regional reserve banks were placed very largely under local ownership and control. Although this

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of the country's credit needs and largely as a result of its studies the Aldrich-Vreeland Act of 1908 was passed. This measure, however, did little more than make provision for a seasonal expansion of credit "to move the crops." Senator Aldrich, a son-in-law of John D. Rockefeller, was one of the sponsors of the unpopular Payne-Aldrich Tariff which Congress passed in 1909.

regionalizing was a concession to the exigencies of politics, it has not seriously impaired the value of the federal reserve system as a channel through which credit can be given fluidity. Much will depend upon the ultimate decision of the question whether the Federal Reserve Board at Washington has power to require modifications in the rediscount rate established by the individual reserve banks, a question which is still unsettled. If it has not, then *national* control of credit is still unachieved.

There have been only three great pieces of constructive banking legislation in the whole history of the United States. Alexander Hamilton's assumption of the public debt and his chartering of the original United States Bank were the first; Chase's National Banking Act of 1863 was the second; and Woodrow Wilson's Federal Reserve Act of 1913 was the third. It can fairly be called Wilson's Act because he threw the whole power of the presidency behind it; he was personally consulted at every stage in its progress from embryo to enactment; and he went to the length of refusing to permit a tired Congress to have a Christmas recess unless the Act was passed. To Woodrow Wilson, therefore, a large part of the credit for this legislation should be, and undoubtedly will be apportioned by the verdict of history.

The establishment of a national budget system

is also to be credited to the Wilson régime, although the Budget and Accounting Act did not go into effect until after President Harding had been inaugurated in 1921. It is one of the marvels of political science that the United States, alone among the great nations of the world, should have remained without a unified budget system down to the era of the World War. Throughout the nineteenth century, and well into the twentieth, measures affecting the national revenue were framed by one set of men and the appropriation bills by another, each working independently and without definite plan. The rest of the world wondered how America could follow such a procedure without encountering financial disaster. Only a rich and rapidly expanding nation could have done it.

But the World War put Congress in a different frame of mind. American participation in this war cost the nation, in less than two years, more than the entire combined expenses of the national government from the inauguration of Washington down to 1917. Interest on the national debt, at the close of the war, amounted to more than the entire annual expenditures before the war began. This, of course, gave President Wilson a rare opportunity to press for the abolition of the old hit-or-miss arrangements, and he used the whole weight of his influence to secure the adoption of a sound budget procedure.

But unfortunately, when the bill establishing an executive budget system came before him for his signature in 1920, it contained one seriously objectionable provision, a clause which stipulated that the Director of the Budget should not be subject to removal by the President. Because of this invasion of the President's constitutional prerogative Mr. Wilson vetoed the measure, but it was reënacted in the following year with this provision eliminated.

To-day, therefore, the United States has a national budget system which will bear comparison with that of any other country. Without it, the program of rigid economy in public expenditures which President Coolidge pursued during the six years of his two administrations would not have been practicable. It is not too much to say that this single improvement in American national finance has already saved the country several hundred million dollars. Incidentally, it has diminished the power of Congress and correspondingly increased the President's influence upon legislation, for nearly all legislation of importance involves the spending of money.

In the British House of Commons there is a rule that no proposal of expenditure may be considered unless it emanates from the crown, in other words unless it has executive sanction in advance. That principle has not yet gained acceptance in the House

of Representatives, yet things are steadily moving to the point where the discrepancy between the English and American practice will not be very great. Without a recommendation from the President it is not easy to get an appropriation through Congress to-day; in a few years, if the budget system continues to function and to gain strength, it may be virtually impossible to place in the budget any appropriation which the President does not want there. In other words, we are gradually edging into the unwritten constitution of the United States a provision that the President shall not only have the initiative in national expenditures but a virtually controlling voice in their determination. For this change, which is far more revolutionary than most of our people realize, the personal leadership and influence of Woodrow Wilson is in large measure responsible.

All this does not by any means complete the catalogue of achievements in domestic legislation during the years 1913-1921. The Federal Land Bank system was created to do for agriculture what the Federal Reserve Banks were designed to accomplish for industry and trade. The National Defence Act of 1916 put the military establishment of the nation on a new plane. The Overman Act gave the President a blanket authority to coördinate or consolidate many scattered bureaus, agencies and offices in Wash-

ington. The Smith-Lever Act of 1914; the act establishing the Tariff Commission in 1916; and the Keating-Owen Child Labor Act of the same year deserves mention in any catalogue of progressive enactments.[1] The Transportation Act of 1920, under the terms of which the railroads are now being operated, is a striking example of constructive legislation, and its provisions concerning railroad consolidation have great possibilities for the future. Nearly the whole of this program was carried through, moreover, at a time when world affairs were being demoralized by the most stupendous conflict in human history, and when the minds of our people were heavily distracted by the great tragedy across the seas. Taken as a whole the Wilsonian program exemplifies little short of a miracle in legislative leadership.

We are still too close to Woodrow Wilson's era for a just appraisal of his qualities and achievements.

> Ne'er of the living can the living judge—
> Too blind the affection, or too fresh the grudge.[2]

It is true of the recent dead as well. But there are some things that stand out beyond peradventure, and on these it is not probable that Clio will ever

[1] The Child Labor Law, however, was declared unconstitutional in 1918.

[2] Bulwer-Lytton, *St. Stephens*.

change her mind. If leadership, as has been suggested, is in large measure the ability to exercise initiative, Mr. Wilson possessed the attribute in high degree. But if it is also, in some measure, the exercise of unerring judgment, he left a good deal to be desired. Mr. Wilson was not skillful in sensing the public mind and temper. Yet he did not disdain to set up his own reactions against those of men far more experienced in foreign or domestic politics. He insisted on surrounding himself with men whose minds ran along with his own. He was intolerant of dissent. He undertook to force his will on Congress and succeeded; he attempted to win confidence from the masses of his own people, and here again he was momentarily successful; but when he sought to impose his ideals on the world as a whole he failed. It was too much for any one man, even a superman. *Ense petit placidam sub libertate quietem.*

Mr. Wilson had a Jeffersonian faith in the power of his own rhetoric. That is why he appealed to the people against the Senate when that chamber balked at his Treaty and Covenant; but the physical effort proved too much for him. There is reason to believe, however, that if President Wilson had been able to reach the ears of the whole electorate by a national radio hook-up in 1919, as it is now possible to do in 1929, the outcome might have been

different. For his eloquence was persuasive, and its effect would have been multiplied many thousand fold.

It is one of the tragedies of history that public men are remembered for their dramatic failures rather than for solid achievements of a less picturesque sort. Everybody knows that Napoleon Bonaparte lost the battle of Waterloo and failed to make himself master of Europe; but how many are there nowadays, even among his own people, who recall that this little Corsican gave France her system of jurisprudence, her structure of local government, her Legion of Honor, her banking system, and her Council of State! How many Americans have any inkling of the fact that the Third French Republic rests to-day upon broad foundations of Napoleonic imperial statesmanship? The popular imagination of our time looks upon the First Bonaparte as a war lord of intermittent genius; yet he was in fact the most constructive European statesman of modern times. His statesmanship endures but is forgotten, while his military reverses are everywhere remembered.

So, unhappily, it is likely to be with President Wilson. The fruits of his personal leadership in domestic legislation, great and permanent in value as they were, seem to be rapidly fading from the public recollection. They have been crowded out

of the picture by the diplomatic Waterloo which marked the closing days of his public career. Nevertheless, among the framers of the unwritten constitution Mr. Wilson deserves an exalted place. He gave new significance to executive leadership, virtually dictated the laws of the land, became the idol of oppressed nationalities everywhere, and showed the world that the President of the United States is "at liberty to be as big a man as he can."

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